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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ROBERT G. CRONSON, as Auditor General of the State of Illinois, and Individually,

Petitioner,

v.

HONORABLE WILLIAM G. CLARK, Chief Justice, Illinois Supreme Court, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

A. Did the United States Circuit Court of Appeals, in dismissing the consolidated appeals from the District Court, err in holding that the appeals involved no Federal due process issues emerging from the underlying state case[1] and further in holding that Petitioner lacked standing in the Federal proceedings to raise such Federal due process violations?

B. In the underlying *Madden* case against which Petitioner sought Federal relief, did the Illinois Supreme Court act as the judge of its own case in violation of Petitioner's due process rights when that court had its own agent and acting administrator sue Petitioner and thereby brought before itself, as a trial court of original jurisdiction, a mandamus action in which it resolved legal issues in its own favor upholding its own pre-announced position in a long and heated public funds audit dispute with Petitioner?

C. Did the Illinois Supreme Court's self-initiated action threaten Petitioner's liberty and property interests where that court found substantial failure of the Auitor General to perform his duties and when both the State Constitution and State Auditing Act expose him to loss of office for nonfeasance or failure to perform his official duties?

D. Did Petitioner, who was made defendant against his will in such a flawed judicial proceeding, have stand-

[1] *William M. Madden, Acting Director, etc. v. Robert G. Cronson*, 114 Ill.2d 504, 501 N.E.2d 1267 (Ill. 1986) hereinafter sometimes referred to as "the *Madden* case" or the "underlying case".

ing to ask a federal court to grant declaratory and injunctive relief under 42 U.S.C. Section 1983 thus preventing his threatened, actual and ongoing constitutional injury?

E. Did the Illinois Supreme Court impermissibly and with bias prejudge the *Madden* case by earlier making numerous extra-judicial pronouncements of its position on controlling legal issues of the dispute?

F. Are pecuniary interests the only interests which undermine fair adjudication in violation of due process where, as in *Madden* the mandamus decision directly advanced the Illinois Supreme Court's repeatedly declared goal of securing a restrictive audit of its funds which would exempt its own administrative agencies from public audit scrutiny?

PARTIES TO THE PROCEEDINGS BELOW

In the proceedings below, Robert G. Cronson, Petitioner herein, was the plaintiff-appellant suing as Auditor General of the State of Illinois, and individually. The Respondents, herein, being the defendants-appellees below, (hereinafter referred to as the "State Supreme Court" or "Illinois Supreme Court") consist of Honorable William G. Clark, Chief Justice and the Honorable Daniel P. Ward, Honorable Joseph H. Goldenhersh, Honorable Howard C. Ryan, Honorable Thomas J. Moran, Honorable Seymour Simon, Honorable Ben Miller, Associate Justices of the Supreme Court of Illinois; also Honorable Juleann Hornyak, Supreme Court Clerk and Honorable William M. Madden, Acting Director of the Administrative Office of Illinois Courts.

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REASONS FOR GRANTING THE WRIT:

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

ROBERT G. CRONSON, as Auditor General of the State of Illinois, and individually, plaintiff-appellant in the underlying action, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, described below.

OPINIONS BELOW

The opinion of the court below, hereby sought to be reviewed, *Robert G. Cronson, as Auditor General of the*

State of Illinois, and individually v. Clark, as Chief Justice of the Illinois Supreme Court, et al. is reported at 810 F.2d 662 (7th Cir. 1987). In that case the appeals court dismissed consolidated appeals Nos. 86-2527 and 86-3019 from the United States District Court for the Central District of Illinois, Springfield Division. The District Court opinion and judgment order are reported at 645 F.Supp. 793 (C.D. Ill. 1986). (Appendices D and E). The opinion of the Court of Appeals panel (Posner, J.) and accompanying judgment order were filed and entered with the Clerk of the court January 20, 1987. (Copies are reproduced as Appendices A and B hereto)

The Auditor General thereafter on February 4, 1987 petitioned that court to grant rehearing, with suggestion for rehearing *in banc*. The petition for rehearing was denied by order entered February 20, 1987. (Appendix C hereto)

The mandamus proceeding in *Madden* in the Illinois Supreme Court was the precipitating event leading to the Federal proceedings below and is more fully described in the Statement of the Case. The opinion in *Madden* was filed December 3, 1986 and is referred to herein by references to 501 N.E.2d 1267 and cited pages thereof. The discussion of the *Madden* case in this petition for writ of certiorari is not for the purpose of seeking any "state issue" review thereof by this Honorable Court, but solely to provide the background and describe the manner in which the complained of violations of Federal due process occurred in that Illinois case; also to show how in *Madden*, the Illinois Supreme Court launched, tried and adjudicated its own case in which it was the real plaintiff and party in interest, deciding in its own favor a lengthy dispute with Cronson over important public audit issues.

JURISDICTION

This Court has jurisdiction to review the judgment and opinion entered and filed January 20, 1987 of the United States Court of Appeals (7th Cir.) below, by Writ of Certiorari pursuant to 28 U.S.C. Section 1254(1). In consequence of the above-mentioned petition for rehearing of that judgment, denied February 20, 1987, the time for the filing of this petition, pursuant to Rule 20.4 was extended to May 20, 1987. This petition, accordingly, has been filed by the latter date. The judgment of the court below is final.[2]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the interpretation and application of the following provisions:

1. The Fourteenth Amendment to the United States Constitution which provides in pertinent part:

> ". . . nor shall any state deprive any person of life, liberty or property without due process of law. . .".

2. 42 U.S.C. Section 1983, Civil Action for Deprivation of Rights, which provides in pertinent part:

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[2] As the court below found, 810 F.2d at 663-664, nothing transpired in the underlying fact situation which would operate to moot the appeal. The same holds true at this time. The *Madden* decision has not yet been implemented or enforced.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . .".

RELATED MATTERS PENDING BEFORE THE COURT

The essential issues in this petition are also raised in a petition for Writ of Certiorari filed May 1, 1987 in *Cronson, as Auditor General of the State of Illinois v. Madden, Acting Director, etc.*, No. 86-1773 (hereinafter "*Madden*"). That petition seeks review on Federal due process grounds of the Illinois Supreme Court's decision and judgment in *Madden, etc. v. Cronson*, reported at 114 Ill.2d 504 and at 501 N.E.2d 1267 (Ill. 1986). The instant Petition is a companion to the *Madden* petition, and is an outgrowth of Petitioner Cronson's unsuccessful effort to secure federal relief against further prosecution or enforcement of *Madden* pursuant to 42 U.S.C. Section 1983 and the due process clause of the Fourteenth Amendment. Petitioner will shortly apply for consolidation of these two related petitions.

STATEMENT OF THE CASE

A. The District Court Case And Appeals.

Petitioner brought his Section 1983 suit on June 5, 1986 in the District Court below to redress deprivation under color of state law of those rights secured to him as Illinois Auditor General for the benefit of all citizens of said State and also secured to him individually by the Due Process Clause of the Fourteenth Amendment of the Constitution. He sought declaratory and injunctive relief to enjoin further proceedings in the *Madden* case, an original proceeding in mandamus wherein the Illinois Supreme Court constituted itself as a trial court to hear the matters there at issue.

In the District Court complaint, Cronson alleged that the Illinois Supreme Court was, in fact, the real plaintiff and party in interest, having caused its own employee and agent, Madden, to sue Cronson and thereby, tried its own case so as to achieve the state court's own interests and goals in a longstanding controversy with Petitioner. The complaint also alleged disqualifying bias, in that members of that court and its representatives, in numerous extrajudicial public statements, had prejudged the legal issues surrounding the public funds of the Supreme Court and its administrative agencies subject to public audit. Jurisdiction was founded on 42 U.S.C. Section 1983 and 28 U.S.C. Section 1343(3).

The Auditor General sued as a constitutional officer under Article VIII, Section 3(b) of the Illinois constitution, and also individually, asserting that his liberty and property rights would be threatened should the *Madden* mandamus action proceed to its expected and ultimate conclusion in the Illinois Supreme Court. (Complaint, Appendix F, App. p. 22)

Following an expedited hearing, and unsuccessful efforts by Petitioner to secure discovery from members of the Illinois Supreme Court concerning their relation to and control over Mr. Madden in filing the mandamus suit, the District Court denied a preliminary injunction; thereafter, on motion of the defendant Justices of the Illinois court, it filed an opinion and order dated October 1, 1986 dismissing the suit and relying principally on grounds of federal abstention. (645 F.Supp. at 793)

The Auditor General filed his appeals No. 86-2527 and No. 86-3019, from those two District Court orders, to the Circuit Court of Appeals below. The appeals court filed and entered its motion panel's opinion and order aforesaid on January 20, 1987. (Appendix A, B, App. pp. 1 and 6) Thereafter by order entered February 20, 1987 that court denied Cronson's petition for rehearing and suggestions for rehearing *in banc*. (Appendix C hereto, App. p. 8)

As noted, the District Court's dismissal was grounded on the federal doctrine of abstention. However, the Court of Appeals panel opinion, (Posner, J.) in dismissing the consolidated appeals, embraced an entirely different rationale. First, it treated the District Court case as involving exclusively "state" law issues, (which admittedly, if that had been true, would not have been federally cognizable nor within Federal jurisdiction); second, it erroneously found lack of standing in Cronson to bring the Federal suit.

B. Background Of Public Audit Controversy Between The Illinois Supreme Court And The Auditor General Involved In The Underlying *Madden* Case.

Notwithstanding the fact that the issues raised in the District Court complaint actually and solely related to the violation of Petitioner's federal due process rights, both the District Court and Circuit Court of Appeals disregarded those complaint allegations and prayers for relief,

giving no attention to the only question raised, i.e., whether the *decisional process* in *Madden* was fatally flawed because the Illinois Supreme Court, commenced, tried and decided its own case.

At no point in the Federal proceedings did Petitioner ever seek resolution of any state issue. Likewise, in submitting the following account of the public audit controversy underlying *Madden* Petitioner does not seek to raise any "state issue" before this Honorable Court. The following Statement of the Case is intended only to provide the *background* of the dispute for the understanding of this Honorable Court; also to demonstrate how the federal due process issues clearly emerged in *Madden*. Whether or not the decision of the Illinois Supreme Court on specific state law audit issues was right or wrong, as a matter of Illinois law, is not the question raised nor was it raised below as the appeals court below erroneously assumed as the foundation piece for its erroneous decision dismissing the appeals.

The importance of the underlying *Madden* case and its antecedent dispute cannot be over-emphasized from the standpoint of Federal due process implications. Thus, the following background is presented in some detail.

Commencing in 1977, the Illinois court and the Auditor General disagreed over the authority and duty of Petitioner to audit as "public funds", under Article VIII, Section 3 of the State constitution,[3] implemented by the Illi-

[3] "Section 3. *State Audit and Auditor General.*

(a) The General Assembly shall provide by law for the audit of the obligation, receipt and use of public funds of the State. The General Assembly, by vote of three-fifths of the members elected to each house shall appoint an Auditor General and may remove him for cause by a similar vote. . .

(b) The Auditor General shall conduct the audit of public funds of the State. . ."

nois State Auditing Act (1985 Ill.Rev.Stat., Ch. 15, Sec. 301-1 *et seq.*), registration and admission fees imposed by the court upon Illinois attorneys as a condition of practicing law. Those fees, and earnings from their investment, collected by the Attorney Registration and Disciplinary Commission ("Commission") and the State Board of Law Examiners ("Board"), as administrative agencies of the court, are held and expended for the regulation of the Bar pursuant to rules of court.

During the past ten (10) years the State Supreme Court has administratively refused to permit the Auditor General to conduct financial/compliance audits of those funds, contending that they are not subject to financial audit. The effect of this was to make the court's two agencies the only entities within any branch of Illinois government claiming immunity from public audit.

The court repeatedly and publicly announced as reasons for its refusal that it had "decided" or reached an "opinion" that 1) the funds received and expended by its two agencies are not "public funds" within the meaning of the Constitution (among other reasons, because they are not *appropriated* by the legislature); 2) that neither the Commission nor Board is a "state agency" within the meaning of the Illinois State Auditing Act implementing the constitution;[4] and 3) that any financial/compliance audits

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[4] The Illinois State Auditing Act (1985 Ill.Rev.Stat., Ch. 15, Section 1-1, *et seq.*) provides:

> (a) This Act implements Article VIII, Section 3 of the Constitution and shall be construed in furtherance of those provisions.
>
> (b) This Act is intended to provide a comprehensive and thorough post-audit of the obligation, expenditure, receipt and use of public funds of the State under the direction and control of the Auditor General. . .".
>
> * * *

State agencies means all ". . . boards, commissions and agencies created by the Constitution, whether in the executive, legislative or judicial branch. . ." (Sec. 1-7)

of the court's own agencies would violate the Illinois constitution's principle of "Separation of Powers" as an impermissible constitutional and legislative intrusion upon the Illinois Supreme Court's inherent judicial power. This position was advanced in a letter to Cronson from then Chief Justice Daniel Ward dated February 28, 1977, saying, in part:

> "The Court has examined this question and has asked me to advise that the funds of the Board and the Commission have not been considered to be public funds."

The Court's position was again articulated in a legal journal article written by the Illinois Supreme Court's then Administrator, the predecessor to Mr. Madden. ("Why the Illinois Attorney Registration and Disciplinary Commission Should Not Be Audited," 1981, 63 Chi.B. Rec. 78).

In four successive hearings before the Legislative Audit Commission ("LAC"), an Illinois legislative agency vested with authority to examine into the Auditor General's compliance with his auditing duties, that body sought the reasons for the state court's refusal to permit financial audits of the funds of its administrative sub-agencies. Speaking through two then Chief Justices, and the court's Administrator (predecessor to Madden), the court announced the three above mentioned grounds of exemption from public audit supporting its "decision" and "opinion" that the Commission and Board are beyond the reach of the Illinois constitutional and statutory audits in question. (Minutes of LAC hearings September 28, 1977, January 10, 1978, April 7, 1978 and November 28, 1979.) These extra-judicial pronouncements included statements reported in the minutes as follows:

> "(Mr. Justice Ward): The Supreme Court funds and the funds received by the judiciary from the legislature, that is public funds, are completely audited each

year. . . . That is not a question before this Commission. We are dealing here with a question of the separation of powers of government (LAC hearing minutes, January 10, 1978, at p. 1).

* * *

The constitution provides that the Auditor General shall examine the public funds and we felt that if he did so, he would be vulnerable to a charge of exceeding his authority." (*Id.* at p. 2)

"(Mr. Justice Goldenhersh): Representative Keane requested clarification of the finding which stated that the auditors had been informed by the court that the commission's funds are not public funds. Justice Goldenhersh said that this represented the considered opinion of the court *but that there had been no formal legal proceeding in which that determination was made.*

* * *

Justice Goldenhersh explained the rationale behind the court's opinion. He said that the court takes the position that these funds are not public funds. If they were, they would be placed in the State treasury and subject to appropriation control. The court does not believe these funds were intended for the purpose or belong in that category. He said it is a matter of constitutional principle. It seems though that if the funds were public funds, there would be an encroachment upon the constitutional powers of the court. . . ." (LAC hearing minutes, November 28, 1979 at p. 13 (Italics added))

While challenging public audit of its sub-agencies on the ground that fees are not appropriated, the court has maintained that funds which it receives by appropriation from the General Assembly (as involved in the *Madden* case) must be submitted by the court to audit by the Auditor General. The court finds no "Separation of Powers" threat in that context; nor has it sought from the Illinois legislature "appropriation" of fees collected by the Commis-

sion and Board or attempted to deposit the same with the state treasurer.

No Illinois court, prior to the majority opinion of Justice Goldenhersh in the *Madden* case had ever before adjudicated any of the three audit issues raised by the court as grounds for freeing its two administrative agencies, the Commission and Board, from public audit.[5] The exception here noted is found in the *Madden* majority opinion itself, reading thusly:

> "In 1977, the court directed the Board of Law Examiners (Board) and the Attorney Registration and Disciplinary Commission (Commission) to refuse defendants' demand. . . . The refusal to permit the audit was based on the conclusion that since the funds collected and expended by the Board *were not subject to the appropriation provisions of Article VIII of the constitution, they were not 'public funds', within the contemplation of Article VIII*". [audit provisions of Section 3 thereof]. See 501 N.E.2d 1267 at p. 1270. (Bracketed material and italics added)

Thus, in stages, the state court has moved from *extrajudicial* pronouncements of its views to a point where it has used its self-initiated case in *Madden* to adjudicate and give those views *legal* effect.

In actuality, for many years billions of dollars of state funds, whether or not held in the state treasury, derived from non-appropriated Illinois governmental sources such as license fees, penalties, rents, tolls, tuitions, and the like,

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[5] In fact, on July 20, 1982, the Illinois Attorney General issued a formal opinion holding that the Commission and Board were "state agencies" whose funds were "public funds" subject to audit under Article VIII, Section 3 of the Constitution, as implemented by the Illinois State Auditing Act; also holding that it was the Auditor General's duty to audit all such funds. (Ill. Atty. Gen. Op. No. 82-022)

have been expended without legislative appropriation and have been treated as public funds.[6] Since the effective date of the constitution of 1970, all non-appropriated funds of the State have been audited by the Auditor General with the exception of fees collected from Illinois attorneys by the Commission and Board under the orders of the Illinois Supreme Court.

In response to that court's refusal to give him access to the financial books of its two agencies, Cronson declined to continue auditing the court's regular appropriated accounts, a function he had performed through June 30, 1978. He took this step on the ground that a partial audit of a state agency limited as to scope by the auditee itself is no audit at all and a breach of his duty; also, because he feared that submission to the court's extra-judicial definition of "public funds", as including only appropriated funds, would create a precedent threatening public accountability over literally billions of dollars of other non-appropriated funds described above.

The *Madden* case is the Illinois Supreme Court's answer to Cronson's refusal to conduct a partial audit of the court's financial books on such a "public funds" premise dictated as to scope by the court itself. When coupled with the court's administrative directions to its two sub-agencies to refuse Cronson access to their financial books, the *Madden* case became the vehicle enabling the Illinois Supreme Court to achieve its overall objective of enforcing a selective audit of its financial accounts on its own terms.

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[6] The report of Roland Burris, Illinois Comptroller, for fiscal year 1984 reveals that over $4 billion of state funds received in that year, out of a total of approximately $17 billion were not appropriated by the legislature; nevertheless they were held either in the state treasury or by separate state agencies as public funds subject to all state regulatory measures.

The events immediately preceding the Illinois Supreme Court's calling of the *Madden* case before itself are as follows: By letter dated December 11, 1984, the Court's then Administrative Director, Roy O. Gulley, requested Cronson to resume his earlier practice of a limited audit of the court's appropriated funds only. Petitioner responded stating his willingness to comply with the court's request but only on the condition that the court would permit funds collected by the court's agencies, the Commission and Board, to be included within the financial audits. This condition was unacceptable to the court and the *Madden* litigation ensued.

C. The Agent-Employee Relation Of Plaintiff Madden To The Illinois Supreme Court In The Underlying *Madden* Case.

The clear agent-employee relationship of Mr. Madden to the State Court is accurately described in the special concurring opinion of Justice Simon in the *Madden* case, as follows:

> "But we cannot and should not gloss over the realities of the situation. Mr. Madden, as Acting Director is an employee of the court and he serves at our pleasure. We cannot but acknowledge that this action could only be maintained with our approval * * * *this is still our lawsuit.* We cannot escape the fact that Mr. Madden works for us and is under our control." (591 N.E.2d 1267, at pp. 1272, 1273.) (Italics added)

The state constitution describes Madden's role to the same effect.[7] He is an agent and employee of the court,

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[7] Article VI, Section 16 of the Illinois Constitution provides in pertinent part:

"Section 16. *Administration.*

"General administrative and supervisory authority over all courts is vested in the Supreme Court and shall be exercised

(Footnote continued on following page)

chosen by it and serving at its pleasure. His responsibility under Article VI, Section 16 is simply to assist the Chief Justice on behalf of the court, in exercising the general administrative and supervisory authority over Illinois courts vested in the State Supreme Court.

D. Other Litigation Initiated Or Controlled By The Illinois Supreme Court Compounding Federal Due Process Problems Raised In *Madden* And In The Case Below.

During the succession of events described above leading to the filing of the *Madden* mandamus case, other litigation adverse to Cronson was pressed in a different forum, namely the Circuit Court of Cook County (*CBA, et al v. Cronson etc.*, No. 82 L 50131, filed July 26, 1982). There, Cronson's antagonists were not the court's administrator, Madden, but its two agencies, the Commission and Board. The lead plaintiff, Chicago Bar Association, was represented by counsel including the same attorney who subsequently was to represent Madden—and, in fact, the Illinois Supreme Court[8] in bringing the mandamus suit below. The object of the CBA suit was to block any public audit of the Commission and Board.

The legal grounds of plaintiffs in the *CBA* case precisely paralleled the extra-judicial interpretations previously announced by the Illinois Supreme Court with reference to the issues of "public funds", "state agencies" and asserted violation of the Separation of Powers doctrine.

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[7] *continued*
by the Chief Justice in accordance with its rules. The Supreme Court shall appoint an administrative director and staff, who shall serve at its pleasure, to assist the Chief Justice in his duties. The Supreme Court may assign a Judge temporarily to any court . . ."

[8] This attorney, in seeking authority to act as a Special Counsel to the State of Illinois, acknowledged that he was "representing the *Supreme Court* in filing a mandamus." (App. I, App. p. 37).

At this point (August 23, 1982), seeking a prompt and final disposition of the entire audit controversy, the Auditor General filed in the Illinois Supreme Court in *People ex rel., etc. v. Attorney Registration and Disciplinary Commission, et al.*, cause No. 57179, a motion asking leave to file a petition for original mandamus. That initial motion was intended to bring before Illinois' highest court all audit issues, including the court's extra-judicial interpretation of "public funds" as embracing only "appropriated" funds; and also the issue of whether a partial audit of appropriated funds alone could properly be conducted by the Auditor General. The court then took Cronson's threshold motion under advisement and the Circuit Court case was stayed. Nothing further was heard *for 19 months* until March 19, 1984, when the Illinois Supreme Court denied the motion.[9]

The Auditor General then petitioned the Illinois Supreme Court for reconsideration and moved recusal of its members on procedural due process grounds and for appointment of an impartial substitute court as permitted by Article VI, Section 16 of the state constitution. (Appendix B-2 attached to Petition for Writ of Certiorari in *Madden*, No. 86-1773 filed May 1, 1987, App. pp. 26-28 thereof.) The court soon thereafter denied both rehearing and the motion for recusal. (See Motion for Recusal and App. of Substitute Court, Appendix G hereto, App. pp. 31-33.

As the CBA case neared resolution before Circuit Court Judge James C. Murray, it was again interrupted when the State Supreme Court on January 29, 1986 relieved Judge Murray of his trial calendar and placed him on temporary

[9] In contrast to the Illinois Supreme Court's inaction over nineteen months before rejecting the Auditor General's motion for leave to file his tendered complaint for original mandamus, that court later granted within 24-hours the similar motion of its Acting Administrator, Madden, for leave to file his complaint for original mandamus against Cronson in the *Madden* case below.

assignment to fill a vacancy in the Appellate Court. Cronson then requested the Chief Justice of the Illinois Supreme Court to exercise his administrative authority to permit Judge Murray to finish the case and to rule on the motions for summary judgment pending before him. The request was denied and the trial calendar was assigned anew to another Circuit judge. The latter ruled in favor of the two state court agencies and their ally, CBA, on April 21, 1987 in an opinion exactly parallelling the extrajudicial pronouncements of the Illinois Supreme Court on the issues as pressed by its two agencies throughout the CBA litigation, a decision exempting them from public audit scrutiny.[10]

E. Manner Of Raising The Federal Questions Below.

The District Court complaint (Appendix F hereto, App. p. 22) is wholly structured upon asserted violations of Petitioner's rights to due process under the Fourteenth Amendment as were the appeals to the Court of Appeals below. All relief sought therein was for the redress of those violations.

Petitioner's only participation in the underlying *Madden* mandamus case in the Illinois Supreme Court was the filing of his Special and Limited Appearance and Motion to Dismiss for Want of Jurisdiction on Due Process Grounds

[10] Revealing as to "due process" is the fact that the same attorney who brought before the Illinois Supreme Court the *Madden* mandamus has also from the outset been a lead attorney for the Chicago Bar Association in the Circuit Court case where he joined in briefs adverting to the *Madden* decision below as dispositive of the "public funds" issue adversely to Cronson; also wherein he wrote that it has been the "consistent opinion" of the state Supreme Court that the Commission and Board are not "state agencies" and do not handle "public funds", the fundamental issues before the trial court. (See Appendix J attached hereto, App. pp. 39 to 41, incl.).

filed April 15, 1986 and denied May 14, 1986, Simon, J., dissenting. (See Appendix B-1 to Petition for Writ of Certiorari, filed May 1, 1987, No. 86-1773 in this Honorable Court)

Thereafter Cronson and his attorney declined the "request" of the Illinois Supreme Court to appear for argument on September 16, 1986 upon the submission of the case by plaintiff Madden. (See Appendix H hereto, App. pp. 34-35) He took this step to avoid any contention that in so doing he had appeared generally or waived his Federal due process objections, a question which would have been for the Illinois court itself to decide.[11]

REASONS FOR GRANTING THE WRIT

A. CONTRARY TO THE OPINION OF THE APPEALS COURT, NO STATE ISSUES WERE RAISED IN THIS CASE AND APPEALS. CRONSON SEEKS ONLY TO VINDICATE HIS FEDERAL RIGHT TO A FAIR TRIAL IN A FAIR TRIBUNAL.

The panel opinion (Posner, J.) of the appeals court opens with a summary denial of grounds for federal jurisdiction in the appeals, erroneously treating the case as one involving state issues and, accordingly, "outside the cogni-

[11] On September 16, 1986, the Illinois Court heard arguments of plaintiff Madden granting him leave to place on the record a belated response to Petitioner's Special and Limited Appearance and Motion to Dismiss which had been denied without comment on May 14, 1986. (Appendix H hereto, App. p. 34) Attached to the Call of Docket of the same date was an extraordinary statement read into the record by Chief Justice Clark, in effect censuring the Auditor General and his counsel for failure to appear and participate in the substantive case as the court had requested them to do. (Appendix H hereto, App. pp. 34, 35)

zance of the Federal Courts." (Appendix A, App. p. 2) This error is compounded by failure to address the sole issue actually raised: namely, whether the state court called before itself its own case against Cronson.

The effect of this was a rejection, at the threshold, of an extraordinarily important case before it could even be fully briefed and argued—a rejection further based on a faulty "standing" analysis by the panel which ignored the allegations of Cronson's personal stake set forth in the complaint. Standing had not even been raised as an issue by the District Court in its decision below.

Contrary to this *ratio decidendi*, which dominates the result-oriented opinion, this case *does not* involve a request to define or otherwise determine the duties, powers or authorities of a state constitutional audit officer.[12] This case *does not* ask the Federal courts to become involved in resolving any aspect of the long audit dispute between the Illinois Supreme Court and the Auditor General as the real and contending adversaries therein.

Finally, this case *does not* concern any grab for power, an office-holder's disappointment over "contraction of his jurisdiction" or any other testing of motivations of the contending parties to the audit controversy as the appeals

[12] This basic misinterpretation of the record and objective of the Federal case first occurred in the District Court's order of September 15, 1986 denying injunctive relief and declaring this to be ". . . a case of first impression involving an important state issue: the duties of a state constitutional officer." The order proceeded: "The substantive inquiries before the [Illinois] Supreme Court are purely state questions which have not been resolved. Thus, unquestionably, the state court is the proper forum in which to first resolve such inquiries before Federal intervention." (Appendix D hereto, App. p. 9). The appeals court viewed the case in the same light, confusing the underlying audit issues with the true objective of the litigation, namely to vindicate procedural due process rights to a fair trial.

court repeatedly asserts or implies. (Appendix A, App. p. 4) Nevertheless, the panel's opinion is largely devoted to such irrelevant matters and non-issues as a basis for challenging the existence of Federal jurisdiction.

This case *does concern* the constitutional power and authority of any court, whether the highest or the lowest in rank of a state, to authorize or direct its own agent and employee to commence and bring before it for adjudication, in an extraordinary grant of the court's original jurisdiction (actually making itself a trial court), a controversy in which the court itself is and always was the real party in interest. Regrettably, the opinion below ignores this real and serious federal question and even seeks to dispose of the case as "frivolous." (Appendix A, App. p. 4) However, the pleadings, record, and numerous federal precedents clearly refute such a mischaracterization.

The complaint demonstrates that the only relief Petitioner has ever sought in the federal proceedings is a fair trial in a fair tribunal, through declaratory and injunctive relief vindicating his federal constitutional rights to procedural due process. The following complaint excerpts confirm this assertion:

> "1. Plaintiff . . . brings this action *to redress deprivation under color of state law of those rights secured to him . . . by the Due Process Clause* of the 14th Amendment to the United States Constitution and by 42 U.S.C. Section 1983. . . ." (Complaint, Appendix F, hereto, at paragraphs 1 and 2) (Italics added)

* * * * *

In his prayer for relief Cronson asked the District Court:

> "1. To preliminarily and permanently enjoin as *fatally biased and violative of procedural due process,* the hearing and further proceedings pending in the Supreme Court of Illinois in the *Madden* case.

2. To declare [the action of the defendants] . . . *unconstitutional insofar as such conduct denies plaintiff, as Auditor General and individually, rights under the Fourteenth Amendment to a trial and adjudication before a fair and impartial tribunal.*" (*Id.* at page 29, Italics added.)

No language of the complaint nor any part of the prayer for relief seeks review of any state issue, as a reading of (Appendix F hereto, App. pp. 22-29) will quickly confirm.

B. THE *MADDEN* CASE WAS THE ILLINOIS SUPREME COURT'S OWN SUIT IN WHICH, IN FACT, IT WAS THE REAL PLAINTIFF AND PARTY IN INTEREST. IN SO ACTING, THE STATE COURT VIOLATED PETITIONER'S DUE PROCESS RIGHTS AND FEDERAL RELIEF SHOULD HAVE BEEN GRANTED.

The fundamental tenet of due process at issue here was clearly stated in *In re Murchison*, 349 U.S. 133, 136 (1955):

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness, of course, requires an absence of actual bias in the trial of cases. To this end, no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome."

This Honorable Court has also said that "every procedure which would offer a possible temptation to the average man as a judge not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law". *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). To the same effect see *Gibson v. Berryhill*, 411 U.S. 564, 36 L.Ed.2d 488 (1973) and *Ward v. Village of Monroeville*, 409 U.S. 57, 34 L.Ed.2d 267 (1972).

The nature of the state court's dual and disqualifying role of intermingling personal or administrative objectives with its judicial function, while wholly ignored in the Seventh

Circuit's opinion, is compellingly revealed in the special concurring opinion of Justice Simon in *Madden*, (501 N.E. 2d 1267, 1272, 1273) excerpts from which are as follows:

> ". . . I concur specially because I believe *too little attention has been given to the appearance of impropriety which arises from our participation in this case.*
>
> * * * * *
>
> "The more difficult point is whether the court is in fact sitting in judgment of its own case. . . . But we cannot and should not gloss over the realities of the situation. Mr. Madden as Acting Director is an employee of the court, and he serves at our pleasure. We cannot but acknowledge that this action could only be maintained with our approval.
>
> ". . . Although the audit will not inure to our benefit—either financially or otherwise—apart from the interest we all have as citizens in a proper accounting of public funds, *this is still our lawsuit.* We cannot escape the fact that Mr. Madden works for us and is under our control. As is evidenced by newspaper editorials dubbing this case 'a bout with the referee,' there is surely the possibility that the public will perceive something improper is taking place. *It is this appearance of impropriety that makes me uncomfortable with hearing this case and would ordinarily require us to step aside.*" (501 N.E.2d at 1273) (Emphasis added)

It is surprising that the Seventh Circuit would simply ignore the concurring opinion which was in its hands before it filed its slip opinion.

As the appeals court should have noted, the majority in the *Madden* opinion simply refused to come to grips with the state court's relationship to its agent Madden and with the due process implications of this course of conduct. Unlike the candor of Justice Simon, the *Madden* majority opinion merely dismisses the contention that the court is trying its own case with the expedient assertion that the contention is "without merit." No attempt is made to

counter Justice Simon's admission of Madden's controlled relation to the court nor to seriously address the allegations contained in Petitioner's Special and Limited Appearance and Motion to Dismiss on Due Process Grounds, filed April 15, 1986 (denied without explanation by the court on May 14, 1986, (Simon J., dissenting)).

Similarly, the *Madden* majority opinion seemingly would excuse the Illinois Supreme Court for trying its own case by arguing that its prior announcements on legal issues were merely "administrative" exercises or a "decision" separate and distinct from any *judicial* action in *Madden*. The state court adds that in any event, the interest of the justices was not "pecuniary", *ergo*, due process considerations are irrelevant (501 N.E.2d at 1271). Finally, the majority opinion makes a passing reference to the ancient "rule of necessity", but perceives no need to consider its use because the court holds itself to be free of any due process violation. (*Id.*).

Just as action by administrative Bar regulatory agencies of a state supreme court constitutes "state action" in which the court itself becomes the real party in interest (see *Bates v. State Bar of Arizona*, 433 U.S. 350, 361, 53 L.Ed.2d 810, 821-22 (1977)), the same result necessarily occurs when a court Administrator, as here, acts for a state supreme court in launching and conducting litigation. The resulting action is the court's own lawsuit. Cf. also *Hoover v. Ronwin*, 466 U.S. 558, 570-574 (1984).

C. IN ADDITION TO INITIATING THE *MADDEN* CASE AND RULING UPON ITS OWN STATUS AS AN AUDITEE, THE ILLINOIS SUPREME COURT HAD REPEATEDLY PREJUDGED THE LEGAL ISSUES THAT IT BROUGHT BEFORE ITSELF.

The Illinois court's self-initiated violation of the *Murchison* doctrine is exacerbated by an unusual history of prejudgment throughout the court's lengthy legal wrangle

with the Auditor General. The extent of this prejudgment is made manifest by the concurring opinion of Mr. Justice Simon in *Madden* who said:

> ". . . *not all* of the current members of the court have taken a position with respect to the Commission and Board funds".

(501 N.E.2d at 1272; (Italics added)

Likewise, the Federal District Court, in its opinion below conceded that:

> "In the present matter . . . complainant has presented the testimony and other communications of [Illinois Supreme] court members tending to show a possible prejudgment of the issues involved."

645 F.Supp. at 797.

On at least five (5) occasions between 1977 and the current date, the Illinois court "decided" the issues by pronouncing its legal positions on the scope of Cronson's audit authority; for example (letter from Chief Justice Ward; legal journal article published at 63 Chi. B. Rec. 78 (1981); and several appearances before the Illinois Audit Commission during 1977, 1978 and 1979. See Statement of the Case at pp. 8-10, inc'l *supra.*)

The unusual statement issued by the Chief Justice of the Illinois Supreme Court on September 16, 1986, (Appendix H hereto, App. p. 34), rebuking Petitioner and his attorney for declining to appear generally and participate in the oral argument of *Madden* (thereby risking waiver of Cronson's special and limited appearance), is also revealing as to the state court's highly partisan stance and the intensity of its involvement in the dispute.

While prejudgments of legal issues, standing alone, may not rise to the level of a constitutional violation (*cf.*, *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 702-703 (1947), the instant indicia of predisposition and

bias, *when combined* with the Illinois court's *Murchison* violation in calling its own case before itself, make it clear that a fundamental due process infringement occurred which should have been rectified.

D. THE ILLINOIS COURT HAS A DIRECT AND SUBSTANTIAL DISQUALIFYING INTEREST IN THE *MADDEN* CASE. ALTHOUGH NOT PECUNIARY IN NATURE, IT IS AN INTEREST WHICH TAINTS THE COURT'S PARTICIPATION IN MADDEN AS A DUE PROCESS VIOLATION.

It is conceded that the Illinois court's longstanding effort to limit the scope of public audits of the court's funds, particularly those collected by its two agencies, involves no pecuniary interest of any individual justice. However, Petitioner maintains that a pecuniary interest in the sense of a stake in money or property, is not the only disqualifying interest capable of undermining a fair and impartial adjudication as required by due process.

The record in this case shows that the Illinois Supreme Court has long been embroiled in a struggle with the Illinois Auditor General in which the court has become committed to legal positions from which it will not recede; positions which it justifies as "administrative" action and which it is determined to uphold come what may.

This Honorable Court has repeatedly recognized that money alone is not the issue. A non-pecuniary interest can be equally disqualifying as a matter of due process. *See, In re Murchison, supra,* (judge who presided as a one-man grand jury also presided over contempt proceedings relating to events in the grand jury proceedings); *Ward v. Village of Monroeville, supra,* (Mayor's adjudication of traffic fines, which contributed to city finances, violated due process); *Johnson v. Mississippi,* 403 U.S. 212, 29 L.Ed.2d 423 (1971) (participation of a judge enmeshed in matters involving petitioner violated due process); and

Mayberry v. Pennsylvania, 400 U.S. 455, 27 L.Ed. 532, 540 (1970) (judge in a "running, bitter controversy").

In his concurring opinion in *Aetna Life Insurance Co. v. Lavoie*, ____ U.S. ____, 89 L.Ed.2d 823 (1986), Mr. Justice Brennan wrote:

> ". . . I do not understand by this language [requirement of direct, personal, substantial and pecuniary interest] that . . . the Court states that only an interest that satisfies this test will taint the judge's participation as a due process violation. Non-pecuniary interests, for example, have been found to require recusal as a matter of due process. (Citing *Murchison.*)
>
> . . . [A]n interest is sufficiently 'direct' if the outcome of the challenged proceeding *substantially advances the judge's opportunity to attain some desired goal* even if that goal is not attained in that proceeding." (89 L.Ed.2d at 838; Italics added.)

The Seventh Circuit Court erred in failing to recognize that the *Madden* case squarely falls within this description. The Illinois court, in its self-initiated *Madden* case, has gone far to attain its desired goals through the exercise of its judicial mandamus power in a case brought before it by its own agent-employee. For one thing it has ruled on its own status and responsibility as a governmental agency by ordering the defendant Cronson to audit the funds appropriated to the Supreme Court. In the process, it has conferred rights upon itself and imposed duties upon Petitioner. This, in and of itself, is an adjudication of a part of its dispute with the Auditor General, namely, whether such a partial audit is lawful. But the Illinois court has gone well beyond that point. Its majority opinion, asserts (501 N.E.2d at 1270) that the court's long refusal to permit the audit of the Commission and Board "was based on the conclusion that since the funds collected and expended by the Board and Commission are not subject to the appropriation provisions of Article VIII

of the Constitution, they were not 'public funds' within the contemplation of Article VIII." The court then goes on to state (501 N.E.2d at 1270) that "[the] question whether those funds are 'public funds' is the issue in a cause pending in the Circuit Court of Cook County (*Chicago Bar Association v. Cronson*, No. 82 L 50131)."

It is obvious that the Illinois Supreme Court reached out in its majority opinion in *Madden* and made it clear to every judge and court in the Illinois judicial system, including the Circuit Court of Cook County, that the state's highest court has considered and concluded that state funds which are not appropriated are not "public funds".

The majority opinion in *Madden* (501 N.E.2d at 1271) holds out the possibility that members of the court might ultimately change their minds and come to a different conclusion concerning the public audit of its two agencies, presumably through its later review of the *CBA* case decision. On the record of this case, such delayed due process, in a remote and conjectural future appeal, offers cold comfort to Petitioner. The Auditor General plainly was entitled to due process at the time he sought federal relief and the pendency of *CBA* does not in any way obviate his right to a present remedy. See *Ward v. Village of Monroeville, supra*, where this Court said:

> "Nor, in any event may the State's trial court procedure be deemed constitutionally acceptable simply because the State *eventually* offers a defendant an impartial adjudication. Petitioner is entitled to a neutral and detached judge in the first instance." (401 U.S. at 61-62) (Italics added)

E. CRONSON HAS STANDING BOTH INDIVIDUALLY AND AS A STATE OFFICIAL.

In its "standing" analysis depicting Cronson as one who would seek to litigate abstract "intramural disputes among state officers" in which he has no personal stake (App.

p. 4), the Seventh Circuit overlooks a crucial point. Cronson never asked to be made the target of the *Madden* proceeding. Thus, his dilemma is tangible and real—not merely theoretical. Once sued in *Madden*, certainly he has standing to defend himself to the fullest extent, and to point out the constitutional faults of that proceeding.

It is surprising that the court below would actually assert in its opinion that "he does not contend that his job is endangered or indeed that he has the kind of job rights that count as property for federal constitutional purposes. . ." (App. p. 4). The fact is, the complaint alleges the contrary as shown above at par. 24. (Appendix F hereto, App. pp. 28-29).

These uncontroverted allegations of standing should be accepted as true:

> "For purposes of ruling on a motion to dismiss for want of standing, both the trial *and reviewing courts must* accept as true all material allegations of the complaint, and *must* construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501, 45 L.Ed.2d 343 (1975). (Italics added)

Nor is it correct to say that Cronson has no property interest in his job. Clearly he is a "tenured" official with a specific term of office under state law and thus has a property right. *Schultz v. Baumgart*, 738 F.2d 231, 234 (7th Cir., 1984). That right is jeopardized by a finding, as in *Madden*, that he has been in substance guilty of a neglect of his official duties. Under Section 3 of Article VIII of the Illinois Constitution he may be removed from office in mid-term "for cause" by a vote of the General Assembly. Section 3 also requires the Auditor General to take the oath of office to "faithfully discharge the duties of the office". The State Auditing Act in Section 2-6 (Ill. Rev. Stat. 1985, par. 302-6) provides that "causes" for removal include ". . . neglect of duty".

Cronson finds himself in a legal dilemma. If he obeys the flawed decision of the Illinois Supreme Court, which

he asserts is a judicial nullity, he violates his official duty and oath. *Cf. Board of Education v. Allen*, 392 U.S. 236, 20 L.Ed.2d 1060 (1968) (standing of officers under oath obligation, upheld). If he acquiesces in the Court's faulty order, his case arguably becomes moot. If he defies the *Madden* mandamus order he is subject to contempt proceedings (see e.g. *People ex rel. Eugiere v. Rice*, 290 Ill. App. 514, 8 N.E.2d 683 (1937). Such contempt proceedings obviously entail a potential personal deprivation of property or even loss of liberty.

Even assuming, *arguendo* that the panel is correct in its narrow view that Cronson's stake is only official and not personal, Cronson's standing to invoke Section 1983 is still clear as a matter of law.

Rule 17(b), Federal Rules of Civil Procedure, provides, in pertinent part:

> "The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile."

In the case of a public official, it is clear that capacity and standing to sue are determined by the laws of the state. *Finch v. Mississippi State Medical Association, Inc.*, 585 F.2d 765, 775, n.11 (5th Cir. 1978); *Baxley v. Rutland*, 409 F.Supp. 1249 (N.D. Alaska 1976).

Under Rule 17(b), and corresponding state law, Cronson clearly possesses standing to sue in his official capacity to protect the strong property interest of Illinois citizens, himself included, in upholding the proper audit safeguards for billions of dollars of public funds. Section 3-12 of the Illinois State Auditing Act provides:

> ". . . the Auditor General may institute and maintain any action or proceeding to secure compliance with this Act and the regulations adopted hereunder." (Ill. Rev. Stat., ch. 15, par. 303-312.)

Cronson is himself an attorney who pays the license fees in question. He did not appear before the Seventh Circuit with an abstract problem as it wrongly inferred. Cronson *has* been sued, in effect, by the Supreme Court of Illinois itself. He *has* been injured, if for no other reason, by the fact that he was and is involuntarily exposed to a fatally biased decision-making process:

> "Submission to a fatally biased decision-making process is in itself a constitutional injury sufficient to warrant injunctive relief. . . ." *United Church of the Medical Center v. Medical Center Commission*, 689 F.2d 693, 701 (7th Cir. 1982).

F. THE DOCTRINES OF FEDERAL ABSTENTION AND JUDICIAL IMMUNITY LIKEWISE IN NO WAY PRECLUDE THIS ACTION.

The District Court's decision erroneously made federal abstention the fulcrum of its denial of relief. In so doing, it disregarded the key exception to the *Younger v. Harris*, 401 U.S. 37, 27 L.Ed.2d 669 (1971), abstention doctrine: namely, that when a litigant lacks any adequate remedy in the state system, the doctrine is inapplicable.

Cronson did everything he could have done in the Supreme Court of Illinois to vindicate his federal constitutional rights. He was totally rebuffed. Thus, he has no state remedy whatever. This lack of adequate state remedy plainly eliminated *Younger* as an obstacle to the maintenance of the instant suit. *Cf. National Metalcrafters v. McNeil*, 784 F.2d 817, 822 (7th Cir. 1986); *Middlesex County Ethics Commission v. Garden State Bar Association*, 102 S.Ct. 2515, 73 L.Ed.2d 116, 124 (1982).

No other procedural road blocks stand in the way of Cronson's right to federal relief as sought in his Section 1983 action. *Mitchum v. Foster*, 407 U.S. 225, 92 S.Ct. 2162 (1972) (Anti-Injunction Act no bar to Sec. 1983 suit to stay proceeding in state court); *Pulliam v. Allen*, 466

U.S. 522, 104 S.Ct. 1970, 80 L.Ed.2d 565, 579 (1984) (judicial immunity doctrine inapplicable). In *Pulliam, supra,* quoting from *Mitchum,* this Court said:

> ". . . the very purpose of Section 1983 was to interpose the federal courts between the states and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, whether that action be executive, legislative, or judicial." 80 L.Ed.2d at 579.

CONCLUSION

The most unfortunate aspect of the due process violation is that it could have been avoided by the Illinois Supreme Court through state law recusal measures. (See Argument E, Pet. for Writ of Certiorari, *Madden,* filed May 1, 1987, No. 86-1773 pp. 25-38)

For the reasons stated herein the appeal should have been considered on the merits by the Seventh Circuit Court, not dismissed on erroneous procedural theories of lack of jurisdiction and standing. Accordingly, the Writs of Certiorari, as requested here and in companion petition No. 86-1773, should be issued.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 86-2527

ROBERT G. CRONSON, as Auditor General of the State of Illinois, and individually,

Plaintiff-Appellant,

v.

HON. WILLIAM G. CLARK, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of Illinois, Springfield Division.
No. 86 C 3180—**Richard Mills**, *Judge.*

SUBMITTED NOVEMBER 4, 1986—DECIDED JANUARY 20, 1987

Before POSNER, COFFEY, and FLAUM, *Circuit Judges.*

POSNER, *Circuit Judge.* This appeal from the denial of a preliminary injunction comes to this motions panel, before oral argument, in response to our request that the parties brief the issue whether the appeal is moot. The appeal is not moot, but the lawsuit must be dismissed. Cf. *Burlington Northern R.R. v. Brotherhood of Maintenance of Way Employees*, 793 F.2d 795, 807 (7th Cir.), cert. granted, 107 S. Ct. 60 (1986).

The plaintiff, Cronson, is the auditor general of Illinois. The defendants are justices of the Supreme Court of Illi-

nois and other officials. Cronson contends that he has a legal duty under Illinois law to conduct a "full" audit of the supreme court, by which he means an audit of all of its branches, including the Attorney Registration and Disciplinary Commission and the Board of Law Examiners. The supreme court disagrees that Cronson's jurisdiction extends to these two branches. It wants him just to audit the other branches of the court. When he refused to do this, the administrator of the Illinois court system filed a mandamus proceeding in the supreme court to compel Cronson to perform the "partial" audit. Cronson contends that such a proceeding violates his rights under the due process clause, because the supreme court (in his view) is acting as a judge in its own cause. He filed suit in federal district court under 42 U.S.C. § 1983 to enjoin the mandamus proceeding, and asked for a preliminary injunction that would among other things have forbidden oral argument in the supreme court in the mandamus proceeding. The district court refused to grant a preliminary injunction, and Cronson has appealed, as he is entitled to do under 28 U.S.C. § 1292(a)(1). With the date for the oral argument before the Supreme Court of Illinois in the mandamus case looming, he asked us for a temporary injunction pending decision of his appeal, see Fed. R. App. P. 8, which we denied; and the argument was held. Nevertheless the appeal is not moot, because the preliminary injunction that Cronson sought and was denied would prevent other proceedings in the mandamus suit that are going on now, as well as the oral argument before the Supreme Court of Illinois, which has already been held.

Although the appeal is not moot, the case is so clearly outside the cognizance of the federal courts that no purpose would be served by setting the appeal for argument in the ordinary course. This is not to say that Cronson's position has no merit as a matter of state law; that is a question on which we express no view. His dispute simply has no place in a federal court.

There is first a serious issue of whether he has standing to maintain this suit in federal court. A plaintiff, in order to have standing in a federal court, must show more

than a violation of law, *Allen v. Wright*, 468 U.S. 737, 754 (1984); he must show the kind of actual or threatened injury that would support a lawsuit under traditional principles of common law or equity, *People Organized for Welfare & Employment Rights v. Thompson*, 727 F.2d 167, 171 (7th Cir. 1984). Indignation that the law is not being obeyed, sympathy for the victims of that disobedience, a passionate desire to do one's legal duty—none of these emotions, however laudable, sincere, and intense, will support a federal lawsuit. See *id.* at 171; *American Civil Liberties Union v. City of St. Charles*, 794 F.2d 265, 268 (7th Cir. 1986). Thus in *D'Amico v. Schweiker*, 698 F.2d 903 (7th Cir. 1983), we dismissed for want of standing a suit brought by administrative law judges of the Social Security Administration who were complaining that a directive by their superiors required them to decide social security cases in a manner contrary to law. They did not suggest that compliance with the directive would reduce their pay or benefits or increase their work or anything of the sort. On the contrary, the directive required them to do less than they thought legally required. This case is the same. Mr. Cronson wants to conduct a more extensive audit than the Supreme Court of Illinois thinks proper. If he won this suit he would have more rather than less work to do.

But if "property" or "liberty" as used in the due process clause of the Fifth and Fourteenth Amendments somehow connoted a right to conduct oneself in public office in conformity with law, maybe an argument could be made that Mr. Cronson had suffered a legally cognizable injury by being forbidden to conduct a full audit. Cf. *People Organized for Welfare & Employment Rights v. Thompson*, *supra*, 727 F.2d at 172. The force of the argument would depend on whether the doctrine of standing is thought merely to confine litigation to concrete disputes between the persons primarily affected by the dispute, see *id.* at 173—a condition satisfied here—or whether the doctrine reflects a broader principle of limiting the federal courts to the redress of more tangible harms than a public

official's disappointment at a contraction of his jurisdiction. We need not get deeper into this question here, however, since it is certain that the due process clause does not confer on Mr. Cronson a right to conduct a more extensive audit of the Supreme Court of Illinois, and therefore that he has suffered no injury on which this suit might be based. In so ruling, we are not skipping over a hard question of subject-matter jurisdiction in order to dispose of the case on the merits—an improper procedure. A frivolous suit does not engage the subject-matter jurisdiction of the federal courts; dismissal of such a suit is therefore jurisdictional too. *Hagans v. Lavine*, 415 U.S. 528, 537 (1974); *Dozier v. Loop College*, 776 F.2d 752, 753 (7th Cir. 1985). This suit is frivolous.

The terms "liberty" and "property" do not encompass the interest of a public official in being allowed to act to the full extent of what he conceives to be his powers under state law. The federal courts do not sit to resolve intramural disputes among state officials over the bounds of their authority under state law. Whether Mr. Cronson is told to conduct a full audit, a partial audit, or no audit, there is no way he can show a deprivation of his life, liberty, or property, which is a precondition to complaining of a denial of due process of law under the Fifth or Fourteenth Amendments. He does not contend that his job is endangered, or indeed that he has the kind of job rights that count as property for federal constitutional purposes, see, e.g., *Schultz v. Baumgart*, 738 F.2d 231, 234 (7th Cir. 1984), or that being prevented from conducting the full audit that he wants to conduct will impose any cost or burden such as might count as a deprivation of liberty or property in the constitutional sense. Reputation is not liberty within the meaning of the Fifth or Fourteenth Amendments, *Paul v. Davis*, 424 U.S. 693, 701 (1976); no more is the satisfaction that a public official derives from wielding the powers of his office to the full.

After the above was written, the district court dismissed the suit and Cronson filed a notice of appeal. As we are ordering the suit dismissed in the appeal from the denial

of the preliminary injunction, the appeal from the dismissal of the underlying suit is moot, and is hereby dismissed. Also after the above was written the Supreme Court of Illinois decided the mandamus proceeding adversely to Cronson. But as he has not yet complied, the suit is not moot on that account.

We affirm the denial of the preliminary injunction, but we order that Mr. Cronson's suit be dismissed for want of federal jurisdiction.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

JUDGMENT—WITHOUT ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 20, 1987.

Before

Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*

ROBERT G. CRONSON, as Auditor General of the State of Illinois, and individually,

Plaintiff-Appellant,

Nos. 86-2527 and 86-3019 v.

HON. WILLIAM G. CLARK, et al.,

Defendants-Appellees.

Appeals from the United States District Court
for the Central District of Illinois, Springfield Division.
No. 86 C 3180—**Richard Mills,** *Judge.*

This cause came before the Court for decision on the record from the United States District Court for the Central District of Illinois, Springfield Division.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the denial of the preliminary injunction is AFFIRMED, and plaintiff-appellant's suit is DISMISSED for want of prosecution [sic], in accordance with the opinion of this Court filed this date. Costs on appeal are awarded to defendants-appellees.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

February 20, 1987.

Before

Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*

ROBERT G. CRONSON, as Auditor General of the State of Illinois, and individually,

Plaintiff-Appellant,

Nos. 86-2527, 86-3019 v.

HON. WILLIAM G. CLARK, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of Illinois, Springfield Division.
No. 86 C 3180—**Richard Mills,** *Judge.*

ORDER

On February 4, 1987, plaintiff-appellant filed a petition for rehearing with suggestion for rehearing *en banc.* All of the judges on the original panel have voted to deny the petition, and none of the active members of the court has requested a vote on the suggestion for rehearing *en banc.** The petition is therefore DENIED.

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* Hon. Harlington Wood, Jr. did not participate in the suggestion for rehearing *en banc.*

APPENDIX D

[September 15, 1986]

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

ROBERT G. CRONSON, as Auditor General of the State of Illinois, and Individually,

Plaintiff,

No. 86-3180 v.

HON. WILLIAM G. CLARK, HON. DANIEL P. WARD, HON. JOSEPH H. GOLDENHERSH, HON. HOWARD C. RYAN, HON. THOMAS J. MORAN, HON. SEYMOUR SIMON, HON. BEN MILLER, respectively, as Chief Justice and Justices of the Supreme Court, JULEANN HORNYAK, Supreme Court Clerk, and HON. WILLIAM M. MADDEN, Acting Director of the Administrative Office of Illinois Courts,

Defendants.

ORDER

MILLS, District Judge:

This federal trial court is asked to enjoin a mandamus action pending before the state's highest tribunal—a case of first impression involving an important state issue: the duties of a state constitutional officer.

The substantive inquiries before the Supreme Court are purely state questions which have not been heretofore resolved. Thus, unquestionably the state court is the proper forum in which to first resolve such inquiries before federal court intervention.

The well-established constitutional principles of states rights, comity and federalism require federal courts to abstain from matters involving important state interests until state courts have had the opportunity to rule.

This paramount principle must prevail.

The Auditor General seeks an injunction against the Supreme Court of Illinois, arguing that he cannot receive due process because the Illinois court of last resort has prejudged the case. Even assuming *arguendo* that there is merit to this allegation, this Court must presume that the state court will safeguard the Auditor General's constitutional rights through adherence to all requirements of due process.

Where important state interests concerning the proper functioning of state government arise, relief is by way of ultimate appeal to the Supreme Court of the United States.

The injunction is DENIED.

(An opinion will follow.)

ENTER: 15 September, 1986.

/s/ Richard Mills
United States District Judge

APPENDIX E

[October 14, 1986]

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

ROBERT G. CRONSON, as Auditor General of the State of Illinois, and Individualy,

Petitioner,

No. 86-3180 v.

HON. WILLIAM G. CLARK, et al.,

Respondents.

OPINION AND ORDER

MILLS, District Judge:

> Each state in ratifying the constitution is considered as a sovereign body independent of all others, and only to be bound by its own voluntary act. In this relation then the new constitution will, if established, be a *federal* and not a *national* constitution.
>
> *The Federalist*, No. 39 (J. Madison)

The Auditor General of Illinois requests this federal trial court—under the guise of 42 U.S.C. §1983—to preliminarily enjoin a mandamus action pending before the Supreme Court of Illinois.

The question presented is: May this Court, consistent with the principles of comity and federalism, enjoin the proceedings before the state's highest tribunal, which is

alleged to have prejudged the cause, where the substantive issue turns entirely upon a construction of state constitutional law and implicated important state interests—the fiscal integrity of the state judiciary and the duties of a state officer.

This Court abstains: The injunction is denied.

Background

William Madden, Acting Director of the Administrative Office of the Illinois Courts, has brought an original proceeding in mandamus before the Supreme Court of Illinois seeking to compel the Petitioner, as Auditor General of Illinois, to conduct an audit of the funds appropriated by the Illinois General Assembly and expended by the Administrative Office. *Madden v. Cronson*, No. 63255 (Ill. Sup. Ct. filed March 27, 1986). Pursuant to Rule 65(a) of the Federal Rules of Civil Procedure, the Auditor General now petitions this Court to enjoin further proceedings in that state action, contending that its continuation will result in a violation of due process under the Federal Constitution. The Petitioner claims, *inter alia*, that the Supreme Court had prejudged his case. Members of the Court, he argues, have demonstrated bias and prejudice through extra-judicial prejudgments of the substantive constitutional and statutory issues involved. Jurisdiction is premised upon 42 U.S.C. §1983 and 28 U.S.C. §1343(3).[1]

Underlying the present controversy is a continuing conflict between the Auditor General and the Supreme Court of Illinois. The problem relates to the Petitioner's state constitutional and statutory authority to conduct finanical audits of the Attorney Registration and Disciplinary Commission ("Commission") and the State Board of Law Examiners ("Board") as part of the regular audit of the state supreme court. Petitioner claims that the Illinois Constitution mandates a public audit of Commission and Board funds, and hence, precludes him from auditing only the Court's appropriated funds. The Supreme Court disagrees. Since neither the Commission nor the Board receive fund-

ing from the General Assembly, but rather operate on fees collected from Illinois attorneys and bar applicants respectively, the Court maintains that the agencies' financial affairs do not fall within the Petitioner's auditing powers. As a consequence of this dispute, the Auditor General has refused since 1979 to audit the funds appropriated to the Supreme Court.[2]

The current dispute arose when, in December 1985, Roy Gulley, then Director of the Administrative Office of the Illinois Courts, requested Petitioner to conduct an audit of the Supreme Court appropriations. The Auditor General refused. Thereafter, Respondent Madden, having assumed the directorate, filed a motion for original jurisdiction and petition for writ of mandamus with the Supreme Court of Illinois alleging the Auditor General's continuing failure to perform his auditing duties in violation of Article VII, Section 3 of the Illinois Constitution and the State Auditing Act. The Supreme Court accepted jurisdiction. It then denied Petitioner's motion to dismiss for want of jurisdiction and due process.

The Auditor General now turns to this tribunal for injunctive relief, maintaining that the Supreme Court of Illinois cannot impartially decide the issue of whether he had neglected his state constitutional duties by failing to audit the appropriated funds.[3]

I.

Since the eloquent characterization of "Our Federalism" by Mr. Justice Black in *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), the Supreme Court of the United States has reiterated in a long line of decisions the principle that where important state interests are involved, a federal court should not act to restrain pending state proceedings when petitioner has an adequate remedy at law and will not suffer great and immediate irreparable injury. *See, e.g., Moore v. Sims*, 442 U.S. 415, 99 S.Ct. 2371, 60 L.Ed.2d 994 (1979); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d

482 (1975). Indeed, the hesitancy of federal courts to intervene in state litigation has long been supported by the desire to avoid duplicate legal proceedings where the first suit allows parties an adequate opportunity to raise constitutional claims. *Younger*, 401 U.S. at 44. But as Justice Black explained, the doctrine is reinforced by an even more vital consideration—the notion of *comity*:

> A system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the state.

Id. Of course, a proper respect for state brethren permits the Court to assume that they will vigorously safeguard federal constitutional rights. *Middlesex Ethics Comm. v. Garden State Bar Ass'n.*, 457 U.S. 423, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982). Thus, *Younger* and its progeny reflect the national policy that only in "exceptional circumstances" will federal courts interfere with ongoing state proceedings.

Unquestionably, the substantiality of the state's interests in its proceedings has been an important factor in abstention analysis from the beginning. *Id.* at 432. The Supreme Court of the United States has consistently ruled that when federal courts are confronted with requests for injunctive relief from state civil functions, "they should abide by standards of restraint that go well beyond those of private equity jurisprudence." *Huffman*, 420 U.S. at 603. But the analysis does not end with a finding of state interest. Federal courts must also determine whether petitioner has an adequate remedy at law and hence will suffer no irreparable injury: "Restated in the abstention context, the federal court should not exert jurisdiction if the plaintiffs had an opportunity to present their federal claims in the state proceedings." *Moore*, 442 U.S. at 425.

Therefore, this Court's initial inquiry is two-fold: *First*, do the Supreme Court proceedings implicate important state interests; and, *second*, does the Auditor General have an adequate opportunity to raise his due process claim in the state court. *See Middlesex*, 457 U.S. at 432.

A

The principle that state courts are the final expositors of state law is indisputable. In fact, abstention cases uniformly reflect the axiom that the threat to our system of government inherent in federal court interpretation of state law is not trivial. *Moore*, 492 U.S. at 427-29. Moreover, the precept becomes increasingly pervasive when the resolution of the substantive issues will inevitably affect the internal structure of the sovereign's government.

The Auditor General cannot reasonably challenge the importance of the pending state mandamus hearing to the proper operation of Illinois government. At the heart of that controversy are complex questions of state constitutional and statutory law which bear upon the duties of a legislative officer, and the fiscal integrity of the judiciary. Whether the Auditor General is empowered to audit Supreme Court agencies is undeniably a query for the state tribunals. As the Supreme Court of the United States has indicated: "Proceedings necessary for the vindication of important state policies or for the functioning of the state judicial system also evidence the state's substantial interest in the litigation." *Middlesex*, 457 U.S. at 432; *see also Trainor v. Hernandez*, 431 U.S. 434, 97 S.Ct. 1911, 52 L.Ed.2d 486 (1977). The only remaining question then is the competency of the Supreme Court of Illinois to fairly adjudicate Petitioner's constitutional claim.

B

The policy of *equitable restraint* expressed in cases such as *Younger* is based in part on the presumption that state tribunals generally provide the parties with a fair and suf-

ficient opportunity to vindicate federal constitutional rights. Thus, the policy of abstention should be set aside only where "exceptional circumstances" render a state court incapable of fairly deciding the issues before it. *Kugler v. Helfant*, 421 U.S. 117, 95 S.Ct. 1524, 44 L.Ed.2d 15 (1975). Of course, "extraordinary circumstances" is an elusive term, subject to a wide variety of interpretations. For present purposes, however, this Court need only address the issue raised by Petitioner's motion: Whether the alleged bias of the Supreme Court of Illinois rises to the level of a due process violation. To phrase it in terms of more traditional jury analysis: Does Petitioner have a reasonable likelihood of prevailing on the merits? *Roland Machinery Co. v. Dresser Industries*, 749 F.2d 380 (7th Cir. 1984); *see also Kugler*, 421 U.S. at 123-129 (Petitioner's claim that he cannot obtain a fair hearing in the state courts is without merit and hence, exceptions to the *Younger* doctrine are inapplicable).

Petitioner contends, and this Court agrees, that a fair tribunal is a basic requirement of due process: "To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955). Likewise, hearings before a partial tribunal are not constitutionally acceptable simply because the disadvantaged party has the opportunity to appeal. *Ward v. Village of Monroeville*, 409 U.S. 57, 61, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972). But Petitioner's broad legal principles are alone insufficient to influence the outcome of this case. Only through a careful study of its superiors' legal opinions involving personal bias and due process may this Court determine the merit of Petitioner's claim.

Younger abstention was directly in issue in *Gibson v. Berryhill*, 411 U.S. 564, 96 S.Ct. 1689, 36 L.Ed.2d 488 (1973), where the Court held that a predicate for dismissal was lacking when the Alabama Board of Optometry was found incompetent to adjudicate a matter by reason of a pecuniary interest. In *Gibson*, the Board, composed sole-

ly of private practitioners, sought to revoke the licenses of optometrists employed by business corporations on the basis of unprofessional conduct. Because of its makeup, the court concluded that the Board's success would possibly redound to the personal benefits of its members. Although the district court considered another source of bias—prejudgment of the facts—sufficient to disqualify the board as well, the Supreme Court affirmed only on the ground of personal financial interest. *Id.* at 578-79.

The Seventh Circuit followed a similar path in *United Church of the Medical Center v. Medical Center Comm'n*, 689 F.2d 693 (1982). In that case, provisions of the Illinois Medical Center Act entitled the Defendant to preside over title reverter proceedings and determine whether certain property should revert to it. The Court held that the Commission's financial stake in the proceedings' outcome made it an unconstitutionally biased decisionmaker. While Plaintiff also alleged the Commission's prejudgment of the facts, the Court declined to reach the question: "We do not . . . reach the question unreached by the Supreme Court in *Berryhill*, whether sufficient indicia of prejudgment can also rise to the level of a violation of due process . . ." *Id.* at 700.

Clearly, federal courts confronted with the issue hesitate to elevate a tribunal's possible prejudgment to the level of a due process violation. In *Federal Trade Comm'n v. Cement Inst.*, 333 U.S. 683, 68 S.Ct. 793, 92 L.Ed. 1010 (1948), the Supreme Court squarely addressed the issue of whether the alleged prejudgment of a controversy alone was sufficient to disqualify an administrative tribunal. There, the FTC charged the Defendants with unfair competition and price discrimination. While the proceedings were pending, Respondent Marquette Cement Company asked the Commission to disqualify itself charging that it had prejudged the issues and was prejudiced against the cement industry generally. The Commission refused.

Although Marquette introduced numerous reports to Congress as well as testimony given by members of the FTC before Congressional committees to make clear that

the Commission believed Defendants' activities violated the Sherman Act, the Court held that this belief did not disqualify the Commission. *Id.* at 700. Noting that most matters relating to judicial disqualification do not rise to a constitutional level, the Court stated:

> [No] decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law.

Id. at 702-03.

Cement Institute is indeed persuasive to, if not binding upon, this federal trial court. In the present matter, as in that case, complainant has presented testimony and other communications of court members tending to show a possible prejudgment of the issues involved. But since *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927), the Supreme Court has consistently declared that personal bias alone without some showing of an additional interest—pecuniary or otherwise—fails to rise to the level of due process. In fact, the Court recently reaffirmed this long-standing principle in *Aetna Life Insurance Co. v. Lavoil*, ____ U.S. ____, 106 S.Ct. 1580 (1986).

That case involved a charge of bad faith refusal to pay an insurance claim. The Supreme Court of Alabama, in a *per curiam* opinion written by Justice Embry, affirmed a 3.5 million punitive damage award against Aetna, clarifying the law in several respects. While an application for rehearing was pending, however, appellant learned that at the time of the opinion the Justice had two actions pending against insurance companies for bad faith failure to pay claims. One of those suits was a class action on behalf of state employees insured under a group plan. Aetna then filed motions challenging Justice Embry's participation in the matter and alleging the entire court should recuse itself based upon its potential interest in the class action.

Explaining that its decision answered the question of under what circumstances the Constitution requires disqualification, the Court in *Aetna* ruled that a "direct, personal, substantial and pecuniary interest" was necessary to rise to a due process level. *Id.* at 1586-88. Therefore, Justice Embry's participation was unconstitutional. The settlement value of his case had increased as a result of the opinion. Considering the possible bias of the remaining Justices, however, the Court stated: "We find it impossible to characterize [their] interest as direct, personal, substantial and pecuniary." *Id.* at 1587-88.

In its opinion, the Court recognized that most questions of judicial disqualification were subject to legislative discretion. Only in extreme cases would recusal on the basis of alleged hostility towards a party be constitutionally mandated: "A judge should disqualify himself where he has a personal bias or prejudice concerning a party. But that alone would not be a sufficient basis for imposing a constitutional requirement under the Due Process Clause." *Id.* at 1585; *see also Margoles v. Johns*, 660 F.2d 291, 297 (7th Cir. 1981), *cert. denied*, 455 U.S. 909 (1982).

Thus, the Supreme Court of the United States has formulated a narrow rule by which this Court is bound. Simply stated, the mere possibility of prejudgment alone cannot rise to a constitutional plane. A more substantial interest is required. The fact that certain members of the Supreme Court of Illinois have entertained views contrary to the Petitioner's does not necessarily mean that the Court's mind is irrevocably closed on the subject. Certainly, the present controversy does not personally involve the individual Justices. It concerns only the administrative functioning of agencies under the jurisdiction of the third branch of government. This Court cannot say that the tribunal's possible bias is so substantial as to require disqualification under the Fourteenth Amendment of the Federal Constitution.

The state interest is far too great and the potential prejudice is far too little.

Abstention is proper.

Ergo, Petitioner's motion for a preliminary injunction is DENIED.

ENTER: October 14, 1986.

FOR THE COURT:

/s/ Richard Mills
United States District Judge

END NOTES

[1] Under *Mitchum v. Foster*, 407 U.S. 225, 92 S.Ct. 2151, 32 L. Ed.2d 705 (1972), 42 U.S.C. §1983 is an expressly authorized exception to the anti-injunction statute, 28 U.S.C. §2283.

[2] The proper scope of the Auditor General's authority is the subject of a declaratory judgment action now pending in the Circuit Court of Cook County—an action inextricably wound with the present controversy. *Chicago Bar Ass'n v. Cronson*, No. 82-L-50131 (Cir. Ct. Cook Co. filed July 26, 1982). The case went forward following the Illinois Supreme Court's refusal to accept original jurisdiction of a petition for writ of mandamus filed by the Petitioner and denial of his motion that it recuse itself and appoint a substitute court to review the motion to reconsider. *People ex rel. Cronson v. Attorney Registration & Disciplinary Comm'n*, No. 57179 (Ill. Sup. Ct. filed August 23, 1982).

At issue in *Chicago Bar* are the parties' varying interpretations of the Illinois Constitution and statutes. Article VII, Section 3 of the constitution provides in Part: "The Auditor General shall conduct the audit of public funds of the State." At issue is whether the funds of the Commission and Board are "public funds" within the meaning of the constitution and enacting statute. *Ill. Rev. Stat.* ch. 15, ¶ 301-1 (1985). The parties also disagree as to whether the Board and Commission are "state agencies" under the definition set forth in *Ill. Rev. Stat.* ch. 15, ¶ 301-7. The Auditor General has jurisdiction to audit all state agencies. *Id.* ¶303-1. Finally, the Supreme Court contends that an audit of the Commission and Board would constitute a violation of the principle of separation of powers as an intrusion upon the Court's judicial power.

[3] Specifically, in hearings before the Illinois Legislative Audit Commission to ascertain the reasons for the refusal to permit public audit of the Commission and Board, the Supreme Court of Illinois, speaking through its respective Chief Justices and administrators, have asserted that the affairs of the agencies do not come within the public domain. Thus, the Auditor General claims the Supreme Court cannot, consistent with procedural due process requirements, determine the propriety of what he believes is a constitutionally forbidden partial audit when its members allegedly agree with Respondent Madden that only a complete audit of the Court is sought.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

ROBERT G. CRONSON, as Auditor General of the State of Illinois, and individually,

Plaintiff,

No. 86-3180 vs.

HON. WILLIAM G. CLARK, HON. DANIEL P. WARD, HON. JOSEPH H. GOLDENHERSH, HON. HOWARD C. RYAN, HON. THOMAS J. MORAN, HON. SEYMOUR SIMON, HON. BEN MILLER, respectively, as Chief Justice and Justices of the Supreme Court of Illinois, JULEANN HORNYAK, Supreme Court Clerk, and HON. WILLIAM M. MADDEN, Acting Director of the Administrative Office of Illinois Courts,

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

JURISDICTION

1. Plaintiff, ROBERT G. CRONSON, brings this action to redress deprivation under color of state law of those rights secured to him as Auditor General of the State of Illinois for the benefit of all citizens of said State, and also secured to him individually, by the Due Process Clause of the Fourteenth Amendment to the United States Constitution and by 42 U.S.C., Section 1983. Plaintiff requests declaratory and injunctive relief to enjoin further proceedings in *William M. Madden, Acting Director, etc.,*

Petitioner v. Robert G. Cronson, Auditor General, etc., Respondent, No. 63255 (hereinafter "*Madden* case"), and original proceeding in mandamus now pending in the Supreme Court of Illinois and in process of being tried by the defendants herein, who are the Chief Justice and Associate Justices.

1. Plaintiff alleges that the Supreme Court of Illinois is the actual Petitioner and real party in interest in the *Madden* case in which the Court has a direct and disqualifying personal interest as more fully set forth below.

3. The proceedings sought to be enjoined herein were brought by the Court's appointee, agent and employee, the defendant Madden; therein, the Supreme Court seeks to prosecute and adjudicate by mandamus an integral issue of a long-standing audit controversy between the Court and plaintiff herein, all in violation of the fundamental due process tenet that no man can be a judge in his own cause, nor try cases wherein he has an interest in the outcome. Plaintiff further alleges that several members of the Supreme Court have on numerous occasions extra-judicially announced their prejudgment of issues pertaining to the audit of public funds of the Supreme Court and its agencies thereby also establishing a disqualifying bias and prejudice.

4. The jurisdiction of this Court is founded upon 42 U.S.C., Section 1983 and 28 U.S.C., Section 1343(3).

PARTIES

5. Plaintiff is the duly appointed, qualified and acting Auditor General of the State of Illinois, pursuant to Article VIII, Section 3(a) of the Constitution of the State of Illinois. He also sues as an individual whose liberty and property interests as a state official would be threatened should the mandamus action proceed to its expected conclusion.

6. Defendant, WILLIAM G. CLARK, is Chief Justice, and the defendants DANIEL P. WARD, JOSEPH H.

GOLDENHERSH, HOWARD C. RYAN, THOMAS J. MORAN, SEYMOUR SIMON and BEN MILLER are Justices of the Supreme Court of Illinois.

7. JULEANN HORNYAK is the Clerk of the Supreme Court of Illinois.

8. WILLIAM M. MADDEN is Acting Director of the Administrative Office of the Illinois Courts, serving at the pleasure of the Supreme Court, and as its agent and employee.

THE CONTROVERSY

9. An audit controversy between the Auditor General and the Supreme Court has existed continuously since 1977. It relates to the duty and authority of the Auditor General to conduct financial/compliance audits of fees collected under Rules of court by the Attorney Registration and Disciplinary Commission of the Supreme Court ("Commission") and the State Board of Law Examiners of the Supreme Court ("Board") as necessary and integral parts of the regular financial audits of the Supreme Court itself.

10. Article VIII, Section 3 of the Illinois Constitution, provides:

> "SECTION 3. STATE AUDIT AND AUDITOR GENERAL
>
> (a) The General Assembly shall provide by law for the audit of the obligation, receipt and use of public funds of the State. The General Assembly, by a vote of three-fifths of the members elected to each house, shall appoint an Auditor General and may remove him for cause by a similar vote. The Auditor General shall serve for a term of ten years. His compensation shall be established by law and shall not be diminished, but may be increased, to take effect during his term.
>
> (b) The Auditor General shall conduct the audit of public funds of the State. He shall make additional

reports and investigations as directed by the General Assembly. He shall report his findings and recommendations to the General Assembly and to the Governor."

11. The above provisions have been implemented by the General Assembly in the Illinois State Auditing Act (Ill.Rev.Stat., 1985, Ch. 15, Sec. 301-1, *et seq.*).

The statute gives the Auditor General jurisdiction over all state agencies to made post-audits and investigations authorized by or under the Act or the Constitution, and defines "state agencies" as follows:

> "Section 301-7. 'State agencies' means all officers. boards, commissions and agencies created by the Constitution, whether in the executive, legislative or judicial branch but other than the Circuit Court . . . ."

12. Since 1977 the Supreme Court has repeatedly refused to permit an audit of the accounts of the Commission and Board to be included as a part of its own regular audit, though requested by plaintiff to do so. In repeated written and verbal communications, the Court, through its Chief Justices and Administrators, extra-judicially have announced that (1) the funds of its two agencies are not "public funds" within the meaning of the constitution and statute; (2) the Commission and Board are not "state agencies" as defined by the statute; and (3) the audit of the funds of the Commission and Board would constitute a violation of the Illinois Constitution's principle of separation of powers as an impermissible intrusion upon the Court's judicial power.

13. These three issues concerning the proper scope of the Auditor General's audit of the Supreme Court are the subject of a pending suit in the Circuit Court of Cook County, *Chicago Bar Association, et al. v. Robert G. Cronson*, No. 82 L 50131. There, the Commission and Board are seeking a declaration that the Auditor General has no authority to audit their funds. That case has been pending for more than two years, having gone forward under the prosecution of the Court's agencies, aided by the Chicago Bar Association as co-plaintiff.

14. That suit went forward following the refusal of the Supreme Court of Illinois in 1982-84 to accept original jurisdiction on a petition for original mandamus filed by the Auditor General to provide a dispositive adjudication by that Court, not only of the aforesaid audit issues presently before the Circuit Court of Cook County, but also to resolve the present controversy in the *Madden* case concerning the propriety of a partial and limited audit as presently being sought by the Supreme Court. *People ex rel. Cronson, etc., Petitioner v. ARDC, et al., Respondents,* No. 57179. After holding the matter under advisement for nineteen (19) months, the Supreme Court denied the Auditor General's motion for leave to file such a petition for original jurisdiction. The Supreme Court also then denied the Auditor General's motion that it recuse itself and appoint a substitute, disinterested court to review the matter.

THE PRESENT PROCEDURAL STATUS OF THE MADDEN CASE

15. While refusing grant of original jurisdiction to resolve all of the audit issues as requested by the Auditor General in 1982-1984 and instead permitting its agencies, the Commission and Board, to continue to litigate during the ensuing two years the audit issues now before the Circuit Court of Cook County in the *Chicago Bar Association* case, the Supreme Court, for the first time in 1985, through its then Administrative Director, called upon the Auditor General to conduct a partial audit of the Supreme Court. Such partial audit request was confined solely to auditing public funds appropriated to the Supreme Court while excluding other public funds collected as license fees and investment income and expended by the Court's agencies, the Commission and Board.

16. The plaintiff's refusal to conduct such a partial audit sparked the filing by the defendant Madden of his motion for leave to file an original petition in mandamus against the Auditor General to enforce an audit limited solely to appropriated funds. Within twenty-four hours following the

filing of papers in the *Madden* case, the Supreme Court on March 27, 1986 granted the motion for original jurisdiction and the filing of Madden's petition for mandamus, a copy of which is attached hereto and designated as Exhibit A.

17. On April 15, 1986, the Auditor General filed a special and limited appearance in the *Madden* case and his Motion to Dismiss for want of jurisdiction based on due process grounds. A copy of said motion is attached hereto as Exhibit B.

18. By order dated May 14, 1986, the Supreme Court, *inter alia*, denied the Auditor General's Motion to Dismiss (Justice Simon dissenting), as shown in Exhibit C hereto attached.

THE SUPREME COURT'S DISQUALIFICATION AND LACK OF JURISDICTION IN THE MADDEN CASE ON DUE PROCESS GROUNDS

19. While filed by defendant Madden as Acting Director of the Administrative Office of the Illinois Courts, the Supreme Court is the actual prosecutor of that litigation and the real party in interest. Defendant Madden is an agent and employee of the Supreme Court serving at its pleasure. His responsibility under the Illinois Constitution (Article VI, Section 16) is simply, "to assist the Chief Justice" in discharging in behalf of the Court, general administrative and supervisory authorities over the Illinois court system vested in the Supreme Court. Plaintiff alleges, on information and belief, that the *Madden* case could not conceivably have been filed by said defendant, except upon the express directions or with the approval of the Supreme Court.

20. Not only was the *Madden* case filed on behalf of the Supreme Court, but it involves a controversy between the Auditor General and the Supreme Court implicating constitutional issues of great public importance, involving public audit of the totality of the Supreme Court's public funds. An integral part of the controversy relates to the

impropriety of conducting a partial audit on terms and conditions dictated by the Supreme Court itself, as auditee.

21. As shown in Exhibit B hereto attached, and specifically pages 4 and 5, and pages 10 through 15 thereof, members of the Court have on numerous occasions demonstrated bias and prejudice in making extra-judicial prejudgments of the substantive constitutional and statutory audit issues. While questions of public funds, state agency and separation of powers are not currently sought to be brought before this Honorable Court in the instant proceeding, the improper prejudgments thereof should be noted in the context of the asserted disqualification of the Supreme Court on due process grounds.

22. By its instant mandamus action, the Supreme Court has effectively called before itself a case in which it would judge its own past conduct and the validity of its own pre-announced position relative to partial vs. total audit of the funds of said Court and its sub-units.

23. By its proceedings in *Madden*, not only has the Supreme Court violated the due process rights of citizens of Illinois represented herein by the Auditor General in enforcing the public's right to know, guaranteed by Article VIII, Section 1(c) of the Illinois Constitution, but also individual rights of the plaintiff, whose entitlement to continue to hold the office of Auditor General is threatened by the attempt in the *Madden* case to declare that plaintiff has failed to perform his constitutional and statutory auditing duties in declining an audit limited to appropriated funds.

IRREPARABLE HARM

24. All of the above actions of the defendants in filing, prosecuting and proceeding further in the *Madden* case will cause plaintiff, as representative of citizens of Illinois, irreparable harm because plaintiff, as Auditor General, will be denied constitutionally protected due process rights and because plaintiff Cronson, individually, could be wrongfully

subjected to the loss of his public office without due cause or justification if members of the Supreme Court of Illinois were to resolve and adjudicate the *Madden* case in accordance with their own interests and under conditions of bias, prejudice and procedural lack of due process.

25. Plaintiff has no adequate legal remedy herein.

WHEREFORE, plaintiff requests this Honorable Court:

1. To preliminarily and permanently enjoin as fatally biased and violative of procedural due process the hearing and further proceedings pending in the Supreme Court of Illinois in the *Madden* case.

2. To declare that the action of the defendants in filing said suit against the plaintiff Cronson, and in any further proceedings thereunder, is and would be unconstitutional insofar as such conduct denied plaintiff, as Auditor General and individually, rights under the Fourteenth Amendment, to a trial and adjudication before a fair and impartial tribunal.

3. To award plaintiff its costs and expenses of this litigation, including reasonable attorneys' fees.

4. To award plaintiff such other and further relief as this Court may deem just and equitable.

DATED this 5th day of June, 1986.

Respectfully submitted,

ROBERT G. CRONSON,
Auditor General of the State
of Illinois, and individually,

By: /s/ Samuel W. Witwer, Sr.
Samuel W. Witwer, Sr.
Rubin G. Cohn
Samuel W. Witwer, Jr.

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APPENDIX G

Being Part Of Appendix B-1 As Filed April 15, 1986 In *Madden, Etc. v. Cronson, Etc.*, No. 63255 – MANDAMUS

IN THE SUPREME COURT
OF THE STATE OF ILLINOIS

No. 57179

PEOPLE EX REL. ROBERT G. CRONSON, Auditor General of the State of Illinois,

Petitioner,

vs.

ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF ILLINOIS, et al.,

Respondents.

MOTION FOR RECUSAL OF COURT AND FOR APPOINTMENT OF ACTING SUPREME COURT

To the Honorable Judges of the Supreme Court of Illinois:

The People *ex rel.* Robert G. Cronson, Auditor General of the State of Illinois, Petitioner herein, by Rubin G. Cohn and Samuel W. Witwer, Sr., Special Assistant Attorneys General, attorneys for Petitioner, move this Honorable Court to recuse itself from the consideration and determination of Petitioner's Petition for Rehearing and Reconsideration of the order denying Petitioner's Motion

for Leave to File Original Petition for Writ of Mandamus, and to appoint an Acting Supreme Court to hear and determine Petitioner's Petition for Rehearing and Reconsideration, and to act in all further proceedings in this Court directly concerning Petitioner's cause, and as grounds for such Motion, state:

1. This Court, having publicly and officially expressed predeterminations of the issues, is disqualified by law from hearing and determining the Petition for Rehearing and Reconsideration, Petitioner's Motion for Leave to File Original Petition for Writ of Mandamus, and all further proceedings in this Court directly concerning Petitioner's cause.

2. Since such predeterminations of the issues were repeatedly, publicly and officially announced as actions of the entire Court, the disqualification necessarily applies to all of its members.

3. This Court has authority under Article VI, Section 16, of the Constitution of Illinois, to appoint an Acting Supreme Court from among other sitting and retired judges of courts of this State.

4. The recusal and appointment of an Acting Supreme Court is consistent with this Court's constitutional duty and judicial interest in protecting the integrity of the Illinois judicial system and the public interest in the impartial administration of justice by the Court.

5. Failure of the Court to recuse itself would constitute a denial of due process to Petitioner by state action under the Constitution of the United States and the Constitution of Illinois through non-action of the judicial branch of state government.

An explanatory memorandum in support of this Motion is attached hereto, together with an affidavit of the Petitioner.

(The explanatory memorandum, being in the nature of a brief, is omitted from this appendix in deference to U.S. Sup. Ct. Rule 21.3).

Respectfully submitted,

ROBERT G. CRONSON, Petitioner

By: /s/ RUBIN G. COHN

By: /s/ SAMUEL W. WITWER (SR.)

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APPENDIX H

SUPREME COURT OF ILLINOIS

CALL OF THE DOCKET, SEPTEMBER 16, 1986

No. 63255 —
William M. Madden, Acting Director of the Administrative Office of the Illinois Courts, petitioner, v. Robert G. Cronson, Auditor General of the State of Illinois, respondent. Oral argument by Richard J. Phelan for petitioner. Submitted. Agenda 31.

Petitioner is given leave to supplement the record with the transcript of a hearing held in the United States District Court for the Central District of Illinois, Springfield, on Friday, September 12, 1986, in Case No. 86-3180, *Cronson v. Clark, et al.* Petitioner is given leave to file a response to respondent's motion to dismiss, which was denied on May 14, 1986. Petitioner is given leave to supplement the record with *Standards of American Institute of Certified Public Accountants, Audit and Accounting Guide.*

No. 63255 — *Madden v. Cronson.*

CHIEF JUSTICE WILLIAM G. CLARK:

The statement that I am about to make is on behalf of the entire court.

On March 27, 1986, this court allowed petitioner, the Acting Director of the Administrative Office of the Illinois Courts, leave to file a petition for an original writ of mandamus to compel respondent, the Auditor General, to conduct an audit of the funds appropriated by the General Assembly and expended by the Administrative Office.

On April 15, 1986, respondent filed a "special and limited appearance for motion to dismiss for want of jurisdiction based on due process grounds." In support of this motion to dismiss, respondent contended that this court lacks jurisdiction in this cause and charged the court with "disqualifying bias."

On June 5, 1986, respondent filed suit in the United States District Court for the Central District of Illinois seeking to enjoin this court from ruling on the instant petition for mandamus relief and made as defendants to the federal court action all seven justices of this court, the instant petitioner, and this court's clerk and informed this court that the Auditor General would not file a brief or otherwise appear before this court.

On September 8, 1986, this court entered an order requesting that the parties appear for oral argument today, Tuesday, September 16, noting the importance of the issues and finding that the public interest would best be served by oral argument.

The United States District Court dismissed the respondent's suit seeking to enjoin this court, and respondent sought a stay before the United States Court of Appeals for the Seventh Circuit. In a letter dated September 16, 1986, respondent's attorney, Special Assistant Attorney General Samuel W. Witwer, wrote to the clerk of this court restating the position of the Auditor General as set forth in his special appearance and motion to dismiss for want of jurisdiction on due process grounds which the Court had previously denied and as set forth in his complaint in the United States District Court, Central District, 86-3180. On September 16, the United States Court of Appeals for the Seventh Circuit denied the respondent's motion to stay the order of the United States District Court.

It is unfortunate that having been denied relief by the United States District Court, and the Court of Appeals for the Seventh Circuit having refused to stay the dis-

trict court's order, the respondent has not appeared and explained why he has no constitutional or statutory duty to audit millions and perhaps hundreds of millions of dollars of taxpayers' funds over a nine-year period. The court believes that because of the important public question and the large sum of taxpayer money involved, the Auditor General, a constitutional officer and officer of this court, and his attorney, Samuel W. Witwer, a special assistant attorney general, had a duty to be present here today.

APPENDIX I

(Letterhead Of)

NEIL F. HARTIGAN
ATTORNEY GENERAL
STATE OF ILLINOIS
SPRINGFIELD
62706

March 10, 1986

Mr. Richard J. Phelan
Phelan, Pope & John, Ltd.
180 North Wacker Drive, Suite 500
Chicago, Illinois 60601

Dear Mr. Phelan:

You are hereby authorized to appear and you are designated as Special Counsel to the State of Illinois for the fiscal year ending June 30, 1986 for the purpose of representing the Supreme Court of Illinois in filing a mandamus as requested by William M. Madden, Acting Director of the Illinois Courts. The Office of the Attorney General shall take no part in the direction or control of your activities in this litigation. The compensation for your services shall be in accordance with the attached contract.

This appointment is conditional on your compliance with the Attorney General's Code of Conduct as revised April 21, 1981, a copy of which is enclosed.

Please evidence your acceptance of this appointment and its terms by signing the original of this letter in the space provided and return same to this office.

Sincerely,

/s/ NEIL F. HARTIGAN (RVS)
Attorney General

I accept the appointment and agree to its terms. I acknowledge receipt of the Code of Conduct (Rev. 1981), have examined the same this 13th day of March, 1986, and agree to be bound by its terms.

By: RICHARD J. PHELAN

APPENDIX J

Excerpts from Reply of Plaintiffs Chicago Bar Association, et al. (pp. 1-4)

Filed January 13, 1987

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT – LAW DIVISION

82 L 50131

THE CHICAGO BAR ASSOCIATION, ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ILLINOIS, AND STATE BOARD OF LAW EXAMINERS OF THE SUPREME COURT OF ILLINOIS, et al.,

Plaintiffs and Counter-Defendants,

vs.

ROBERT G. CRONSON, AUDITOR GENERAL OF THE STATE OF ILLINOIS,

Defendant and Counter-Plaintiff.

REPLY OF THE CHICAGO BAR ASSOCIATION (CBA), ET AL., PLAINTIFFS, TO SUPPLEMENT TO REPLY OF CRONSON, AUDITOR GENERAL, DEFENDANT

CBA's consistent position throughout this proceeding has been that the Board of Law Examiners and the Attorney Registration and Disciplinary Commission, both established

by Rules of the Illinois Supreme Court (also plaintiffs), are not "State Agencies" but agencies of the Supreme Court, and that their monies, collected from applicants and lawyers, are not "Public Funds".

CBA submits that the foregoing also has been the consistent opinion of the Illinois Supreme Court and its members. That has been apparent from various statements and writings of the Justices and Court Administrators referred to in CBA's previous Memoranda filed in this case.[1] This Court should give due deference to those opinions and follow the same.

---

[1] Among the statements and writings of the Justices and Court Administrators are the following:

* * * * *

In due course, the Court rendered its decision ordering that the Writ of Mandamus, as sought by Madden, issue. In its opinion, through Justice Goldenhersh, a copy of which is attached hereto, the Court addressed the issue of whether the funds of the Board and the Commission were "Public Funds." It said:

> "--- In 1977, the court directed the Board of Law Examiners (Board) and the Attorney Registration and Disciplinary Commission (Commission) to refuse defendant's demand that he be permitted to conduct a performance audit of their records. The refusal to permit the audit was based on the conclusion that since the funds collected and expended by the Board and Commission were not subject to the appropriation provisions of article VIII of the Constitution, they were not "public funds" within the contemplation of article VIII ---"

* * * * *

CBA's contentions are sound. This Court should find that Cronson does not have any right to audit the funds, books, files and records of the Board or the Commission.

Respectfully submitted,

/s/ RICHARD J. PHELAN

/s/ ROSEANN OLIVER

/s/ JOHN F. MCCARTHY

Attorneys for
The Chicago Bar Association
and others, plaintiffs

(2)

No. 86-1870

Supreme Court, U.S.
FILED
JUN 24 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ROBERT G. CRONSON, as Auditor General of the State of Illinois, and Individually,

Petitioner,

v.

HONORABLE WILLIAM G. CLARK, Chief Justice, Illinois Supreme Court, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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12 PM

QUESTION PRESENTED FOR REVIEW

Was the Court of Appeals for the Seventh Circuit correct in affirming the District Court for the Central District of Illinois' decision to refuse to enjoin proceedings before the Illinois Supreme Court where the substantive issue in those proceedings turned entirely upon a construction of state constitutional law and implicated important state interests?

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In The

Supreme Court of the United States

October Term, 1986

ROBERT G. CRONSON, as Auditor General of the State of Illinois, and Individually,

Petitioner,

v.

HONORABLE WILLIAM G. CLARK, Chief Justice, Illinois Supreme Court, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

STATEMENT OF THE CASE

This case arose from petitioner's request that the United States District Court for the Central District of Illinois enjoin proceedings filed against him in the Illinois Supreme Court. The Illinois Supreme Court proceedings related to a dispute involving a determination of the extent of petitioner's obligations as Auditor General of Illinois to audit certain state expenditures. The District Court denied petitioner's motion for a preliminary injunction and subsequently dismissed the suit on grounds of comity and federalism. The United States Court of Appeals for the Seventh

Circuit affirmed the denial of the preliminary injunction and the dismissal of the suit because it found that petitioner had suffered no injury on which his suit might be based and therefore lacked standing. The Court of Appeals also unanimously denied petitioner's motion for rehearing *en banc*.

Most of the petitioner's Statement of the Case is simply irrelevant to this petition, as evidenced in part by the five questions presented for review that are identical to the questions presented for review in a separate petition for writ of certiorari, *Cronson, Auditor General of the State of Illinois v. William M. Madden, Acting Director of the Administrative Office of the Illinois Courts*, No. 86-1773, filed May 1, 1987. The major inaccuracy in petitioner's Statement of the Case is the assertion that "at no point in the federal proceedings did petitioner ever seek resolution of any state issue." (Petition at 7) This is untrue. In seeking to enjoin the state court from ruling on an issue of state law, petitioner sought to deny the state the right to decide a question of important state interest.

REASONS FOR DENYING THE WRIT

I.

PETITIONER HAS NOT SHOWN WHY CERTIORARI SHOULD BE GRANTED.

United States Supreme Court Rule 17 provides that "review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." The Petition for Certiorari ignores this Rule. Petitioner makes no claim that the courts below decided "an important question of

federal law which has not been, but should be, settled by this Court" or made a decision in conflict with applicable decisions of this Court or any other federal court of appeals or state court of last resort. United States Supreme Court Rule 17.1(a) and (c).

Rather than trying to show "special and important reasons" such as those listed in Supreme Court Rule 17, petitioner simply reargues the substantive merits of his case below. Petitioner merely claims he has a federal interest at stake. This claim, without more, is insufficient to warrant review by this Court. For this reason alone, this petition for writ of certiorari should be denied.

II.

THE DISTRICT COURT CORRECTLY APPLIED WELL SETTLED PRINCIPLES OF FEDERALISM AND COMITY.

Far from "depart[ing] from the accepted and usual course of judicial proceedings," Supreme Court Rule 17.1(a), the District Court applied "well established constitutional principles of states rights, comity and federalism [which] require federal courts to abstain from matters involving important state interests, until state courts have had the opportunity to rule." *Cronson v. Clark*, No. 86-3180, slip op. at 2 (C.D. Ill. 1986). (App. to petition at 10) The District Court recognized that important state interests were involved in delineating the duties of the Illinois Auditor General pursuant to the Illinois Constitution and Illinois statutes.

The principles followed by the District court were set out in *Younger v. Harris*, 401 U.S. 37 (1971), which applied the rule that a federal court will not interfere with the orderly functioning of the state's judicial process and that

state courts are fully competent to adjudicate federal constitutional rights. "[I]t has been perfectly natural for our cases to repeat time and time again that the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions." *Younger*, 401 U.S. at 45.

The District Court accordingly recognized that "proper respect for state brethren permits the court to assume that they will vigorously safeguard federal constitutional rights." *Cronson v. Clark*, 645 F. Supp. 793, 795 (C.D. Ill. 1986). (App. to petition at 14) *See, Middlesex Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982) (holding that regulation of the state bar and state judicial system is a substantial state interest requiring federal court abstention). Moreover, the Supremacy Clause requires that "the Judges in every State shall be bound" by the United States Constitution. U.S. Const. Art. VI, cl. 2. This fundamental principle of our federal system of government underlies the reluctance of federal courts to enjoin ongoing state court actions. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 605 (1975).

The District Court correctly followed these precedents by refusing to enjoin the state court proceedings. Petitioner's writ of certiorari should be denied.

III.

THE COURT OF APPEALS CORRECTLY HELD THAT THE DUE PROCESS CLAUSE CANNOT REMEDY HYPOTHETICAL INJURIES.

Petitioner failed to allege a concrete injury legally cognizable under 42 U.S.C. § 1983 (1987) ("Section 1983"). Thus, he had no standing to bring this action in a Federal Court. The Seventh Circuit recognized that "there is no

way [Cronson] can show a deprivation of his life, liberty or property, which is a precondition to complaining of a denial of due process of law under the Fifth or Fourteenth Amendments." *Cronson*, 810 F.2d 662, 665 (7th Cir. 1987). (App. to petition at 4) Petitioner lacks any "personal injury fairly traceable to the defendant's allegedly unlawful conduct likely to be redressed by the requested relief," *Allen v. Wright*, 468 U.S. 737, 751 (1984), the required test under well-established standing principles.

This Court has held that to have standing to maintain an action under Section 1983, a plaintiff must show that state officials deprived him of a property interest or a right secured by the Constitution and laws of the United States. *Baker v. McCollan*, 443 U.S. 137, 140 (1979); *Board of Regents v. Roth*, 408 U.S. 564, 576-78 (1972). Moreover, "this Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court." *Allen v. Wright*, 468 at 754. Thus, to invoke the due process clause, petitioner must allege injury to a liberty or property interest. No such interest is implicated in the question of how petitioner fulfills certain official duties which was the subject of the action in the Illinois Supreme Court that he sought to enjoin. Therefore petitioner lacks standing under Section 1983. In the words of the Seventh Circuit:

> [T]he terms "liberty" and "property" do not encompass the interest of a public official in being allowed to act to the full extent of what he conceives to be his powers under state law. The federal courts do not sit to resolve intramural disputes among state officials over the bounds of their authority under state law. Whether Mr. Cronson is told to conduct

> a full audit, a partial audit, or no audit, there is no way he can show a deprivation of his life, liberty, or property, which is a precondition to complaining of a denial of due process of law under the Fifth or Fourteenth Amendments.

Cronson v. Clark, 810 F.2d 665. (App. to petition at 4)

The Seventh Circuit acted in conformance with the applicable decisions of this Court and the accepted and usual course of judicial proceedings in concluding that "the due process clause does not confer on Mr. Cronson a right to conduct a more extensive audit," *Cronson*, 810 F.2d at 665, App. to petition at 4, and that his suit therefore should be dismissed for want of federal jurisdiction.

Petitioner's attempt in his petition for writ of certiorari to characterize the underlying action as being a threat to his job is far too hypothetical to cure his standing defect. (Petition at 27) A closer examination of the complaint reveals no allegation that his job is actually in danger. The complaint merely alleges that Cronson "*could* be wrongfully subjected to the loss of his public office." (Complaint ¶ 24) (emphasis added) Petitioner correctly points out that "under Section 3 of Article VIII of the Illinois Constitution, he may be removed from office in mid-term 'for cause' by a vote of the General Assembly." (Petition at 27) However, petitioner has made no allegations that the Illinois General Assembly has begun any such proceedings. Such an injury is both hypothetical and too far removed from respondent's action to confer standing. *See Allen v. Wright*, 468 U.S. 737 (1984).

CONCLUSION

The issue before this Court on this petition for writ of certiorari is not, as petitioner might have this Court believe, whether the Illinois Supreme Court denied Cronson's due process rights when it denied his motion to dismiss for want of jurisdiction, but rather whether based on principles of federalism, comity and standing, the *federal courts* properly refused to enjoin the Illinois Supreme Court from hearing the case. It is well established that the proper path for review of state court decisions is through a state's appellate courts to the United States Supreme Court, *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 605 (1975), not through collateral lawsuits in the federal courts seeking to enjoin the state court proceedings.

WHEREFORE, respondent respectfully requests that this Court deny the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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No. 86-1870

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ROBERT G. CRONSON, as Auditor General of the State of Illinois, and Individually,

Petitioner,

v.

HONORABLE WILLIAM G. CLARK, Chief Justice, Illinois Supreme Court, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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In The

Supreme Court of the United States

October Term, 1986

ROBERT G. CRONSON, as Auditor General of the State of Illinois, and Individually,

Petitioner,

v.

HONORABLE WILLIAM G. CLARK, Chief Justice, Illinois Supreme Court, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

I.

INTRODUCTION

The Illinois Supreme Court does not respond to the petition for certiorari nor have its Chief Justice and five of its six associate justices done so. Only Associate Justice Seymour Simon filed a Responsive brief urging denial of the writ. In his brief, Respondent Simon is basically inconsistent with his prior positions and contentions in *Madden* below.

Early in that case, he *dissented* from the denial by the Illinois Supreme Court in its order of May 14, 1986 of Cronson's Motion to Dismiss on due process grounds. Even more contradictory of his present position was Respondents' criticism of the self-initiated aspects of the *Madden* case, in his special and concurring opinion therein, establishing that the Illinois Supreme Court launched and tried its own lawsuit. (App. A, Pet., pp. 11-13). Among other critical expressions therein at variance with the majority opinion, he said: "It is this appearance of impropriety that makes me uncomfortable and would ordinarily require us to step aside." (App. A, Pet., p. 13). Only by invoking the Rule of Necessity (which the majority opinion declined to do) did Respondent seek to explain his failure to recuse himself.

Petitioner must here reaffirm that in neither of the federal cases below, nor in *Madden*, No. 86-1773, has he sought review of any state issue. He seeks only a fair trial before a fair and impartial court, which is a matter of due process, not of substantive state issue review. However, disregarding the record and pleadings, Respondent asserts:

> "This [Petitioner's contention that only federal issues have been raised] is untrue. In seeking to enjoin the state from ruling on an issue of state law, Petitioner sought to deny the state the right to decide an important state interest."

Thus, Respondent overlooks the fact that no State, even acting through its highest court, has an inherent *right to decide* any question, no matter how substantial the asserted state "interest" or "concern", if in so doing it utilizes a decisional process biased and violative of principles of fair adjudication.

Respondent likewise overlooks the fact that numerous alternative mechanisms for recusal and substitution of a neutral tribunal were suggested in Cronson's Motion to Dismiss which alternatives would have left the matter in "state" hands. It is thus a distortion now to suggest that Cronson seeks herein to defeat "the state's right to decide an important state interest". In his special and concurring opinion below, Respondent viewed it otherwise.

Similar unsupportable arguments are made by the Respondent Madden, agent of the Illinois Court, in his brief in the companion proceeding No. 86-1773. There the Illinois Supreme Court has once again chosen Mr. Madden as its agent, to respond to Cronson's certiorari petition, notwithstanding the fact that Mr. Madden's agency-employee relationship to that court in instituting and conducting the mandamus suit is at the center of the crucial due process issue.

II.

ARGUMENT

A. Petitioner Has Presented Substantial Grounds For Granting The Writ Of Certiorari Herein.

Contrary to Respondent's assertion that "Petitioner simply re-argues the substantive merits of his case below . . . [and] merely claims he has a federal interest at stake" (p. 3), Petitioner has advanced numerous special and important reasons for granting the writ. Petitioner has demonstrated that (a) the Seventh Circuit Court of Appeals handed down a decision ignoring fundamental and relevant decisions of this Court; (b) the case raises unsettled questions of federal law which should now be settled by grant of certiorari, and (c) that the Circuit Court of Appeals, in effect, upheld an extreme departure by the Illinois Supreme Court from "accepted and usual norms of judicial procedure" necessitating exercise of this Court's supervisory powers under Rule 17. To illustrate:

1. The court below ignored as irrelevant *In re Murchison*, 349 U.S. 133, 136 (1955), and its progeny. No teachings of this Honorable Court could be more basic and needful of application than those of *Murchison* in a case such as *Madden*. There due process violations are shown conclusively by the unchallenged assertions of Respondent Simon himself, in his own special and concurring opinion in *Madden*. (App. A to Pet. No. 86-1773, App. pp. 11-12).

2. The novel and astounding suggestion of Respondent, that the Illinois court had a right to adjudicate any substantive "state concerns" and "state issues" free of interference by this Honorable Court, even if the decision-making process violated federal due process (Br. p. 2) ignores both the Fourteenth Amendment and the Supremacy Clause.

3. The decision of the Court of Appeals, in sanctioning the due process violations in *Madden* under the doctrine of abstention, conflicts with the controlling *exception* in *Younger v. Harris*, 401 U.S. 37, 27 L.Ed.2d 669 (1971). *See*, Argument B of this Reply brief, p. 5. In this and other respects, the Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings [and/or] so far sanctioned such a departure . . . as to call for an exercise of this Court's power of supervision." (Supreme Court Rule 17(a)).

4. In narrowly interpreting the disqualifying interest of a biased court, as one limited essentially to "dollars and cents" financial matters, both opinions of the courts below, i.e., the Circuit Court of Appeals and the Illinois Supreme Court, disregard the teachings of *Aetna Life Insurance Co. v. Lavoie*, ____ U.S. ____, 89 L.Ed.2d 823, at 838 (1986), as emphasized in the concurring opinion of Mr. Justice Brennan. Logic dictates that *any* interest sufficient to upset the balance of fair decision-making is disqualifying.

5. The underlying concept of the court below revealed in Respondent's brief seems to be that when a state supreme court regulates its bar, that "state interest" is so paramount as even to warrant a high degree of qualification and limitation of basic constitutional rights to a fair trial. This is contrary to *Pulliam v. Allen*, 466 U.S. 522, 80 L.Ed.2d 565 (1984), and other decisions, establishing the authority of the federal judiciary to intervene in state court proceedings when federal constitutional rights are infringed:

> ". . . the very purpose of Section 1983 was to interpose the federal courts between the states and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action

> under color of state law, whether that action be legislative, executive *or judicial.*" (Emphasis added)

80 L.Ed.2d at 579.

Cf., also, *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 84 L.Ed.2d 205 (1985) (State supreme court rule concerning non-resident attorneys violated federal "Privileges and Immunities" clause).

6. So far as is known, no decision of this Court has dealt with the anomalous situation whereby a court, as below, invokes the Rule of Necessity to justify a self-initiated suit brought by its own agent-employee,—thereby seeking to exonerate itself from due process violations which the court itself affirmatively caused. The real question is: "May the Rule of Necessity be employed by a court which called before itself its own cause so as to override the basic due process rights of a litigant to an impartial and unbiased adjudicator?"

This Court recently declared the importance of an impartial adjudicator as going to "the very integrity of the legal system" and declared the right to be a "basic" constitutional right. *Gray v. Mississippi*, ____ U.S. ____, 95 L.Ed.2d 622 at 639 (1987).

B. Contrary To Respondent's Contentions, The Doctrines Of Federal Abstention And Of Comity Do Not Apply.

Respondent misunderstands the entire concept of federal abstention and comity set forth in *Younger v. Harris*, 401 U.S. 37, 27 L.Ed.2d 669 (1971) which rests wholly on the assumption that justice will be done and federal rights upheld in the state forum:

> "Such a course [abstention] naturally presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved.

> Here, the predicate for a *Younger v. Harris* dismissal was lacking, for the appellees alleged, and the District Court concluded, that the [state tribunal] was incompetent by reason of bias to adjudicate the issues pending before it."

Gibson v. Berryhill, 411 U.S. 564, 577, 36 L.Ed.2d 488 (1973).

The *Younger* doctrine never applies where the state judicial process is itself so seriously flawed that it is inherently incapable of affording a litigant an adequate state remedy. *Middlesex County Ethics Commission v. Garden State Bar Association*, 102 S.Ct. 2515, 73 L.Ed.2d 116, 124 (1982) (litigant must have meaningful state opportunity to adjudicate constitutional claims); *Gibson v. Berryhill*, *supra*, 411 U.S. at 577; *W.C.M. Window Co., Inc. v. Bernardi*, 730 F.2d 486, 491 (7th Cir. 1984) (*Younger* doctrine inapplicable when state tribunal has pre-judged federal claim) and *United Church of the Medical Center v. Medical Center Commission*, 689 F.2d 693, 697-8 n. 3 (7th Cir. 1982) (abstention no bar when state proceeding "fatally infected" with bias).

The constraints of abstention and federalism do not fit this case. Far from offending the *Younger* doctrine, Cronson *upheld* it by first seeking in the Illinois Supreme Court, a correction of its irregular procedure and substitution of an impartial decision-maker. His motion to dismiss on due process grounds was rejected out of hand (Simon, J., dissenting). In the face of this history of futility, it defies logic for Respondent now to suggest that Cronson had or has an adequate opportunity to pursue his federal constitutional claims in the state forum.

C. The Impact Here Upon Cronson's Liberty And Property Interests Is More Than Sufficient To Confer Standing And To Implicate Due Process Deprivation.

It is ironic that Respondent, having sued Cronson in a self-originated proceeding effectively charging him with nonfeasance in office now argues that he lacks standing to muster a defense or even to complain of obvious infringements of his due process rights. Respondent's suggestion that Cronson has no "liberty" or "property" concerns or that his stake is so tenuous as to compare with that of the plaintiffs in *Allen v. Wright*, 468 U.S. 737 (1984) and *Board of Regents v. Roth*, 408 U.S. 564 (1972) is far-fetched. Both *Allen* and *Roth* are sharply distinguishable on their facts. In *Allen*, the unsuccessful plaintiffs attacking the adequacy of IRS procedures for dealing with tax exempt private schools practicing racial discrimination were unable to show any actual or prospective injury to themselves or even a remote nexus between themselves and any private school. (468 U.S. at 758-759). They were at best "concerned bystanders". (*Id.* at 756). Likewise, in *Roth, supra*, the plaintiff, an untenured college instructor, could make out no conceivable injury to his liberty or property rights simply on the basis that the school had failed to renew his expired employment contract—especially where the employer refrained from any criticisms or charges which ". . . might seriously damage [plaintiff's] standing and associations in his community". (408 U.S. at 573). The situation of Cronson is far different because:

1. Cronson was made the unwilling target of a self-initiated suit by a court determined to rule upon the scope of its own duties as an auditee following a long and heated dispute on the subject. The gist of its own suit was to attack Cronson's performance in his office. Cronson then

rejoined in the only meaningful way he could, namely, by an action under Title 42, Section 1983, not only as an office holder, but *individually*. He did this precisely because he feared that the outcome of the fatally infected procedure would adversely impact him as an individual subjecting him ". . . to the loss [in mid-term] of his public office without due cause or justification . . .". (District Court Complaint at par. 24). Under Illinois law, Cronson can lose his job "for cause" including, ". . . neglect of duty". (Illinois Constitution, Article VIII, Section 3; Illinois State Auditing Act, Section 2-6 (Ill. Rev. Stat. 1985, Ch. 15, Section 302-6)).

The Seventh Circuit Court evidently missed this portion of Cronson's complaint below, since that Court erroneously asserted that "he does not contend that his job is endangered or indeed that he has the kind of job rights that count as property for federal constitutional purposes . . ." 810 F.2d at 665. Thus, the Appeals Court, through possible inadvertence, overrode Cronson's uncontroverted pleading allegations on his personal standing which it should have accepted as true.[1]

While apparently conceding that Cronson did in fact plead the standing allegation which the Appeals Court overlooked, Respondent asserts that: ". . . a threat to his job is far too hypothetical to cure his standing defect . . ." (Br. in Opp. at 6). Respondent adds that there is no indication to date that the Illinois General Assembly has begun any removal proceeding (*Id.*). Thus, Respondent

[1] "For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts *must* accept as true all material allegations of the complaint, and *must* construe the complaint in favor of the complaining party." (emphasis added) *Warth v. Seldin*, 422 U.S. 490, 501, 45 L.Ed.2d 343 (1975).

would have this Court rule that only *an accomplished* injury to "property" rights or "liberty"—not the *threat* of such injury—is sufficient under the due process clause. This is clearly not the law.

In *Gibson v. Berryhill, supra,* plaintiff optometrists, who feared *prospective* loss of their licenses if subjected to a hearing before a biased state tribunal, were held entitled to federal injunctive relief, even though no injury had yet been sustained and it was by no means certain that the state tribunal, if allowed to proceed, would in fact revoke the licenses. (411 U.S. at 578-579). To the same effect, *see, Goldberg v. Kelly,* 397 U.S. 254, 25 L.Ed.2d 287, 292 (1970) where welfare recipients threatened with loss of future relief payments *had standing* to complain of due process violations.

2. Cronson's individual standing is reinforced by the fact that as a licensed attorney, he annually pays substantial fees to the Illinois Supreme Court's Disciplinary Commission, the very fees which that court in *Madden* has sought to exempt from public audit scrutiny and protection. Cronson has a property right to object to this lack of proper stewardship and accountability over his own license fees.

3. Finally, Cronson has special statutory standing under Illinois law[2] which, in turn, applies to federal proceedings under Rule 17(b) Fed.R.Civ.P., to assert the property rights of all Illinois citizens who deserve a proper safeguarding and protection through public audit of all state funds in the hands of all agencies of government.

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[2] ". . . the Auditor General may institute and maintain any action or proceeding to secure compliance with this Act and the regulations adopted hereunder." (Ill. Rev. Stat., Ch. 15, Sec. 303-12).

Plainly, Cronson's interest in the mandamus suit which the Illinois Supreme Court called before itself is hardly imaginary or speculative as that court would now imply.

III.

CONCLUSION

For all of the reasons stated above and in the original petition for certiorari, Petitioner respectfully requests that the writ be issued.

Respectfully submitted,

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